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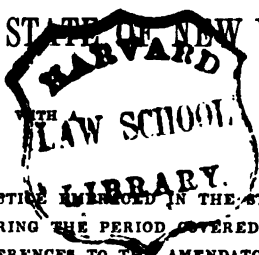






REPORTS  
OF  
PRACTICE CASES,  
DETERMINED

IN THE  
COURTS OF THE STATE OF NEW YORK:

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YORK REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS  
VOLUME, WITH REFERENCES TO THE AMENDATORY  
ACTS OF 1855.

BY ABBOTT BROTHERS,  
COUNSELLORS AT LAW.

VOL. I.

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*Rec. Oct. 22, 1856.*

## PREFACE.

---

THE present volume is the first of a new series of reports of practice cases in the courts of the State of New York. Since the commencement of the changes in the system of procedure in courts of justice, which have for some time been taking place in this State, the necessity of prompt and accessible information upon the decisions of points of practice, has been much felt by the profession. It is the aim of this series to assist in supplying that want. But while decisions under the Code of Procedure form the most numerous and important class of the cases here reported, we have by no means confined the series to such. Cases illustrative of criminal practice, of practice in special proceedings, of the rules of evidence, &c., are to a considerable extent embraced in the plan.

But while we have intended that these reports shall cover a tolerably broad field in this respect, we have endeavored to confine the selection of cases, principally to such as are likely to possess a permanent value and authority. We have not intended that these reports shall be a mere magazine of the current judicial news of the day, but a selection of standard cases, such as promise to be useful guides to the practitioner for many years to come. This object will be steadily kept in view in future volumes, and as we hope, with increased success.

THE PRACTICE DIGEST, which follows the reports of cases, differs materially from the usual digest appended to the volumes of reports published at the present day. We have made it a digest of all practice cases contained in the standard Reports of this State, which have been issued during the period covered by the publication of this volume. This digest is an original one, studiously prepared from an examination of all the cases reported. It is not a compilation of the marginal notes of other reporters, but every note has been freshly digested, and the notes fully collated. It embraces also the substance of so much of the Acts of 1855 as relates to questions of practice. And, while studying a suitable conciseness, we have also endeavored to give the substance of all decisions or statutes likely to be of frequent application, so fully and accurately that the practitioner who has not the volumes referred to at hand, may safely act upon these notes. Should this feature of the volume be approved, it will be continued in the future volumes of the series.

Those who have found these reports as they have been issued in numbers, serviceable, may rest assured that the series will be continued, with such improvements as time may suggest.

For the convenience of subscribers in other States of the Union, we will add a few words of explanation in respect to the comparative authority of the different reports cited in the digest.

4 SELDEN'S COURT OF APPEALS REPORTS. [4 *Seld.*] 1 KERNAN'S COURT OF APPEALS REPORTS. [1 *Kern.*]

The Court of Appeals is the highest court in the State, for the determination of questions of law, arising in civil or criminal actions. It has appellate jurisdiction only, and its decisions are conclusive upon all other courts of the State, until recalled by the Court of Appeals itself. The decisions in this court are reported by an official reporter. The 4 Selden terminates the series conducted by Mr. Selden; and the 1 Kernan is the initial volume of that to be issued by his successor in office. Wherever it occurs that a decision quoted in our digest from Selden or Kernan conflicts with one reported from another court, it is to be understood that Selden or Kernan as the case may be, states what is the law of the State; and that the contradictory decision is overruled. The conflict in such cases usually arises of course from the fact that the overruled decision was rendered before the decision of the Court of Appeals was published.

1 HOWARD'S COURT OF APPEALS CASES. [1 *How. App., Cas.*]

This volume contains the opinions of the Court of Appeals in some cases which have not heretofore been reported by the official reporters of the Court. The decisions quoted from this volume, although few in number, are of course of equal authority with those cited from Selden and Kernan.

17 & 18 BARBOUR'S SUPREME COURT REPORTS. [17 & 18 *Barb.*]

These are the regular reports of the New York Supreme Court. This is the most important court of original jurisdiction, in the State; and its jurisdiction extends throughout the whole State, and is of the most comprehensive character. It is organized, however, into eight distinct districts, located in different portions of the State. The judges of each district hold the Supreme Court in that district only; and are independent of those of any other. There is a very general disposition in the different districts to follow each other's decisions, for the sake of preserving a convenient uniformity, yet it not unfrequently happens, especially in respect to questions of practice, such as are within the control and discretion of the court, that different districts adopt different courses, and their decisions conflict. Where this is the case, neither district has power to overrule the decisions of the other, but the practice remains variant in different portions of the State, until in course of time a uniform rule is perhaps prescribed in the Court of Appeals.

2 DUER'S NEW YORK SUPERIOR COURT REPORTS. [2 *Duer*]. 1 E. D. SMITH'S COMMON PLEAS REPORTS. [1 *E. D. Smith's C. P. R.*]

The New York Superior Court and Court of Common Pleas are two local courts established in the city of New York. The Common Pleas is considered the oldest court in the State. The Superior Court has been organized but about a quarter of a century.

These two courts possess a less comprehensive jurisdiction than the Supreme Court, but within their jurisdictions the three courts may be considered as possessing co-ordinate authority. Neither of them possesses appellate power over the other, but appeal from the decisions of each lies directly to the Court of Appeals. The same reasons which give rise to different rulings on questions of practice, in

the different districts of the Supreme Court occasion conflicting decisions in these three courts. When therefore contradictory decisions are cited in the digest, from Barbour, Duer, and Smith, it is to be understood that neither of them are paramount to the other, but that the decisions of each court are of authority in that tribunal.

1 ABBOTT'S PRACTICE REPORTS. [*Ante.*]

As this volume consists of cases reported from all the various courts, the weight which is to be attached to any one case is to be determined by considering from what court it emanated. As the reader of the digest has of course the volume before him, the references to it have been made as concise as possible.

10 HOWARD'S PRACTICE REPORTS. [10 *How. Pr. R.*]

This volume, also, consists of cases—principally but not exclusively practice cases,—determined in the various courts of the State.

1 PARKER'S CRIMINAL REPORTS. [1 *Parker's Cr. R.*]

This volume contains reports of criminal cases, tried or argued in various courts of the State. Some of them are cases in the nature of appeals, which were elaborately argued, and well considered, before decision. The substance of these decisions, so far as they relate to questions of practice, is given at considerable length, in the digest. Many of the cases in the volume, however, are only reports of rulings upon trials; and our notes of these are very concise, being intended merely to direct attention to the case referred to.

LAWS OF 1855.

It was not to have been expected that so important a measure of legal reform as the Code of Procedure should be perfected at once. There has been hitherto, and probably will be for some years to come, frequent occasion for legislative modification of its details. Such changes as were introduced by our legislature at their session of this year have been fully noted. It will be noticed that some of the decisions are superseded by enactments.

GENERAL AND SPECIAL TERMS.

It may be well to add, that a decision described as the decision of the special term of any court, means the decision of a single judge holding that court. The general term is holden by several judges—usually three—and sits generally for the purpose of hearing appeals from decisions made at the special term. It is from the decision of the court at general term that appeal is taken to the Court of Appeals. The decisions at general term are of course entitled to the most weight.

ABBOTT BROTHERS.

119 Nassau-street, New York.





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# ABBOTTS' PRACTICE REPORTS.

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NEW-YORK.

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COCKLE *a.* UNDERWOOD.

*New York Superior Court : Special Term, September, 1854.*

## DISCONTINUANCE.—COUNTER-CLAIM.

After a counter-claim has been set up, and is admitted of record, the plaintiff will not be allowed to discontinue as a matter of course.\*

Special grounds must be shown in such case, in favor of an application for leave to discontinue.

Motion for leave to discontinue.

The answer to the complaint in this action denied the indebtedness alleged in the complaint, and also set up a counter-claim. It was served June 10, 1854. The plaintiff examined both of the defendants as witnesses, and then, on the 13th September following, no reply having been meanwhile put in, he served written notice of discontinuance of the action, tendering defendants' costs, which they refused to accept. He

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\* Upon an appeal to the General Term, this decision was unanimously affirmed. See also on this subject, *Seaboard and Roanoke R. R. Co. v. Ward*, post.



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forthwith served an order to show cause why the action should not be discontinued on payment of defendants' costs.

*R. E. Mount*, for plaintiff.

*Wm. Bliss*, for defendants.

BOSWORTH, J.—This motion is made on the theory, that the plaintiff is entitled, on paying defendants' costs of the action, to such an order as he moves for, as a matter of course. Under the old system, a plaintiff could enter a rule, in the book of common rules, discontinuing the action on payment of costs. Such a rule, in an action at law, could be entered at any time before trial, without an application to the Court.—*Graham's Pr.*, 663-4.

In the Court of Chancery, the complainant might move to dismiss his own bill, with costs, as a matter of course, at any time before the decree. This is stated in the books of practice to be the rule.—1 *Barb. Ch. Pr.*, 228.

The practice of the Courts, as it existed when the Code took effect, consistent with the Code itself, is continued, subject to the power of the Courts to relax, modify or alter the same.—*Code*, § 469.

The plaintiff insists that the pre-existing practice, in relation to discontinuing actions, is consistent with the provisions of the Code, and that it has not been modified by any rule of the Supreme Court, or of this Court. The defendants on the other hand contend, that the practice allowing a plaintiff to dismiss his action before trial, as a matter of course, on payment of costs, is inconsistent with certain provisions of the Code.

Sections 149 and 150, allow a defendant to set up a counter-claim, and recover upon it; if admitted by failing to reply to it, or on proof of it, if it is controverted.—§§ 168 and 274.

If the action of the plaintiff arises on contract, the defendant may set up as a counter-claim, any cause of action arising on contract, whether the damages are liquidated or not. This could not have been done before the Code. The defendant may notice the action for trial, prove his claim when the cause is reached, or take judgment for it, if admitted by the plead-

ings.—§ 258. In this respect the practice, in suits at law, has been altered. The object of the Code seems to be, that a defendant sued on contract and having causes of action against the plaintiff, arising on contract, may litigate them in that action, and have a judgment, if entitled to it.

The costs of an independent action are avoided; one claim may be used to satisfy another, to the extent due upon it; the one having the larger claim may have a judgment for the excess; each party is made an actor and may bring the action to trial.

There would seem to be no reason for permitting a plaintiff to discontinue on the mere ground of his disinclination to proceed further in his action, especially when a counter-claim has been set up in the answer, and no reply has been made, and liberty to reply is not asked.

Cases may occur which would justify a court in making such an order. But such cases must present some grounds to justify the inference that the plaintiff would suffer some substantial prejudice if the order was not granted.

On the other hand, it is obvious that the granting of such an order might deprive a defendant of a substantial right. If a counter-claim should be outlawed, at the date of such an order, it would be manifestly unjust to grant it. Other cases readily suggest themselves in which it would be improper to grant such an order as a matter of course.

It is unnecessary to undertake to state any rule by which all applications may be determined.

It is sufficient to say, that after a counter-claim has been set up, and admitted of record, the court will not allow the plaintiff to discontinue his action, as a matter of course; special grounds must be shown in favor of the application; they must make a case, rendering such an inference proper, to prevent a plaintiff from being inequitably prejudiced in his rights or remedies, and which, at the same time, will not work any practical wrong to the defendant.

The motion must be denied.

## WILSON v. THE MAYOR OF NEW-YORK.

*New-York Common Pleas ; Special Term, July, 1854.*ILLEGAL TAXATION.—REMEDIES AT LAW.—DENIAL OF  
INJUNCTION.

The power to determine what description of persons shall be taxed, is vested solely in the legislature.

They might have imposed taxes on the personal property within the State, of non-residents.

But they have not done so.

A non-resident illegally assessed, has several remedies at law.

1. He may apply upon affidavit to the assessors to rectify their assessment.
2. There are some cases where a *certiorari* will lie.
3. So of a *mandamus*.
4. So also of a writ of prohibition.
5. There are other modes, depending upon the circumstances of each particular case, in which an illegal assessment may be redressed.
6. In some cases the assessors themselves, and the parties issuing the original warrant for collecting the tax, will be personally liable.
7. Illegal taxes paid under duress of goods, and with protest, may be recovered back at law.

An injunction to restrain the collection of a tax illegally laid upon personal estate, will not be granted.

This action was brought to restrain the collection of a tax imposed, illegally, as was contended, upon the plaintiff. The facts sufficiently appear in the opinion.

*A. F. Smith*, for plaintiff.

*R. J. Dillon*, for defendants.

WOODRUFF, J.—The complaint in this action is addressed to this court as a court of equity, and prays a perpetual injunction to restrain the collection of a tax for the year 1850, imposed upon the defendant as the owner of personal property within the city and county of New-York, for the collection of which a warrant has been issued by the defendant, Hart, as Receiver of Taxes for the city and county of New-York, directed to the defendant, Jenkins, a constable ; in pursuance

of which, the latter has distrained certain property of the defendant, and is proceeding to sell the same for the collection of such tax. The facts which the plaintiff avers entitle him to the relief sought, are, that he is illegally assessed in the city and county; that the plaintiff, during the whole of the year 1850, and for eight years last past, has resided in Norwalk, in the State of Connecticut, and has not resided within the State of New-York, and that as such resident of Connecticut, and a taxable inhabitant therein, he has been duly assessed upon his personal property, and has paid taxes thereon in that state; that the assessors of the city and county of New-York made the assessment of the amount authorized by law to be raised by tax upon the real and personal property in the city, and under the pretence that the plaintiff was a taxable inhabitant in the said city, did, in 1850, assess him as the owner of personal property in the third ward of the said city; that the assessment roll containing such assessment, was afterwards delivered to the tax commissioners and to the board of supervisors, and submitted to their action, and afterwards the corrected assessment rolls of each ward were delivered to the receiver of taxes, with the usual warrant to collect the tax, and pay the same to the chamberlain of the city; that the name of the plaintiff was inserted in such roll, and he was charged therein with \$568<sup>1</sup>/<sub>100</sub>, as a tax upon personal property; that the plaintiff received no notice, and did not know that he was to be assessed, nor that any tax had been imposed upon him or his property until long after such assessment roll had been delivered to the said receiver; that soon after the plaintiff learned that such tax had been imposed, in May, 1851, he applied by petition, verified by his oath, to the common council, stating the fact of his non-residence, and praying the remission of the said tax, which they refused; that previous to this petition, to wit, in January, 1851, the defendant, Hart, (receiver of taxes,) issued his warrant to the defendant, Jenkins, (a constable,) commanding him to levy the amount of the said tax, with interest and costs, by distress and sale of the goods and chattels of the plaintiff, and such distress has been made, and sale thereof will be made, unless restrained by order of the court.

The complainant then avers, that it will be the duty of the defendants, Hart and Jenkins, to pay the money, if collected, to the city chamberlain; that he has notified Jenkins of his non-residence; that Jenkins persists in his levy; that neither Hart nor Jenkins are of sufficient responsibility to answer for the damages he will sustain by a sale of his property under such warrant; that the plaintiff cannot have adequate relief except in a court of equity; that such tax, so attempted to be imposed, is illegal and void; that such illegality does not appear on the face of the proceedings, but that the evidence of the want of jurisdiction in such assessors to impose the tax, and of the illegality of such imposition, must be given, out of the record of the proceedings, by proof of extrinsic facts, upon proving which, the plaintiff is entitled to have the assessment declared illegal as to him, and the collection of the tax restrained, &c.

The defendants have interposed separate demurrers to the complaint, "for that the said complaint does not state facts sufficient to constitute a cause of action."

It was insisted by the counsel for the defendants, on the argument of the demurrers herein, that the plaintiff is liable to taxation in this state in respect of his personal property found here when the assessment was made; and that inasmuch as the plaintiff does not aver that he had at that time no personal property within the city and county of New York, he has not shown that the assessment was either illegal or erroneous.

I. The power of the State to tax all property within its limits, whether real or personal, cannot be denied. Taxation itself, for the purpose of maintaining and upholding the government, is essential to the idea of its existence, and the power to impose such taxation, is said to reside in the government, as a part of itself. In this State, while the constitution recognizes the existence of the power to impose taxes, it leaves its exercise to the legislature, and, save only by prescribing certain rules regarding the mode of enacting laws imposing taxes, it has left the extent of taxation and the manner of its apportionment, solely and exclusively to the wisdom and justice of the legislature. In one section of the constitution, (§ 5, art. 7,)

the particular taxes mentioned, (for the increase of the sinking fund of the State,) are authorized in these terms, viz: "The legislature shall, by *equitable* taxes, so increase the revenues," &c. And it may be assumed as within the spirit and meaning of the constitution, that *all* taxes should be equitable. But I apprehend, that in the *apportionment* of taxes, and the assigning to *persons* or to *property* the portion which each shall contribute to the public burthens, the legislature have the sole and exclusive power of determining what is just and equitable, and upon what description of persons, and upon what property within the State, and in what ratio, the imposition shall be made. (See *Providence Bank v. Billings*, 4 *Peters*, 514; *McCullough v. Maryland*, 4 *Wheat.* 428; cited in *The People v. The Mayor, &c.*, 4 *Comstock*, 427.)

II. And there is nothing inequitable in requiring of the owners of personal property found in this State, and kept here protected by our laws—it may be, acquiring enhanced value from our institutions and government, our public works, the large development of public and private enterprise within our limits, and various other circumstances, which give value and usefulness to property, and hold out to non-residents an inducement to bring or send their property or funds to be used or sold here, that they may derive enhanced prices or larger income therefrom,—to render to our government a just equivalent—to bear the same burthen, in respect of such property, as the citizen himself bears, in respect of his own estate, in the like condition.

On the contrary, if the question be judged of upon the simple inquiry, what is equitable, as between those who bring their wealth to our State and city, and here avail themselves of our facilities for trade, commerce and enterprise of every kind, seek and obtain our protection, become competitors for the gains and profits of that business which we have done so much to facilitate and promote, and bear away the enhanced income, which (by reason of the advantages of our location, the character of our institutions, the encouragement we give to private enterprise, and the facilities which our public works afford) they have been able to acquire; if what is equitable between *them*, be the sole guide in the apportionment of taxa-



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tion, it may be said with great truth, that they should share in proportion to the benefits enjoyed, and no fairer criterion could be devised, than the amount of property so employed and so protected. To say that, because one of them, after the heat and labor of the day—after the accomplishment of the purpose for which he is employing his property here,—crosses the river, or the Connecticut line, to seek the sleep necessary to restore his vigor for the next day's contest with his citizen rival, though he leaves his property secure and protected under the efficient guardianship we provide, he, nevertheless, ought to pay nothing, and his resident competitor in the strife for wealth, should pay all; or, to say that his contribution shall only be given to the sovereignty that protects him in his sleeping hours, is plainly inequitable, and if no other considerations but such as respect those individuals be taken into view, is unjust.

And the present plaintiff, in this aspect of the case, would have no just ground of complaint, if engaged in business in this city, and employing his capital, and enjoying the advantages above suggested, our government should require from him an equivalent therefor, by levying upon his capital the same contributions which our own citizens are required to pay for the common benefit, notwithstanding it suits his convenience or pleasure to fix his domicile just without our borders.

But in the exercise of the power of taxation, and in its apportionment, considerations of expediency do and may properly influence the legislature in their enactments; and it is eminently desirable that while equality is to a certain degree sought, uniformity in the rule of taxation should obtain; and it may often be true that what is upon the whole best for the State, results in a seeming inequity as between individuals or inequality between particular cases; while comity towards other states may also be properly regarded. Thus, if the legislature were to tax the personal property of non-residents, consistency and comity would require that the personal property of our own citizens employed or invested out of this State should be exempt from taxation here. So the policy of the State may require that non-residents should be encouraged to bring or send their funds to this State for employment or invest-

ment, and our community may realize therefrom, in other modes, advantages, which in the end fully compensate for the immunity from taxation, which is accorded to them.

III. But it is unnecessary to pursue this branch of the subject. The inquiry is, in this tribunal, not what property might equitably be taxed nor what property it is expedient to tax, but what property is by law taxable?—what has our legislature by its enactments made taxable?

And on this subject I have no doubt that our legislature intended to recognize, and have recognized and adopted in reference to taxation, the general rule that personal property has no *situs*—that it follows the domicile of its owner, and that the incidents to the ownership, in this respect, as in many others, (e. g. the law of its distribution on the death of its owner, and its administration by courts of probate; its transfer by assignment; the rights of creditors thereto under attachment, after such assignment, and the like,) are governed by the law of the domicile.

It is true that the first section of title 1st of chapter 13, part 1st, of the Revised Statutes, under the head of "Property liable to taxation," declares that "all lands and all personal estate within this State \* \* \* shall be liable to taxation," \* \* \* (with certain specified exceptions not material to the present inquiry).

But when this is read in connection with the generally recognized rule above referred to, that personal property has no *situs* apart from the domicile of the owner, which in substance imports that personal property is not within the meaning of the statute, "within this State," unless its owner resides here, it is entirely consistent with its exemption from taxation here; and to my mind the subsequent provisions of the same chapter show that such was the meaning of the legislature.

Thus section 5 of title II. enacts that "every person shall be assessed in the town or ward where he resides, when the assessment is made, for all personal estate owned by him." This may be said to imply its converse, that no person shall be assessed in any town or ward in which he does not reside.

Again, in prescribing the duties of assessors, section 9, article 2, of same title, directs them to prepare an assessment roll,

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in the first column of which they shall set down the name of all the taxable *inhabitants of the town or ward*, and in the fourth column the full value of all the personal estate owned by such person.

Section 11 provides for a separate assessment of lands belonging to non-residents, but no provision is made respecting personal property owned by a person who is not an inhabitant, thus showing that no such assessment was contemplated, and no duty imposed upon the assessors in respect of the personal estate of any such person.

Section 15 prescribes the oath to be taken by a person assessed, and what oath shall govern the amount of assessment; and this, as well as the other sections above referred to, make the taxable amount embrace *all* personal property *owned by him*. This shows that no regard whatever is had to the place where such personal property may happen then to be; it is treated as in the possession of its owner.

Surely if the assessment was designed to embrace property of non-residents which might be found here, it would have exempted the property of residents which might happen to be in another jurisdiction, for the legislature aiming, as we must believe they would, to enact a just rule, would undoubtedly assume that a just rule here would be a just rule, and would be adopted, within such other jurisdiction; and, therefore, if the taxation of the personal property of a non-resident, was proper here, the taxation of the personal property of our citizens would be imposed there. And hence, that if we tax non-residents here, and tax all the property of our own citizens also, the latter would be taxed twice on the same subject.

And, moreover, if the personal property of a non-resident is taxable, in what town, ward or county is it taxable? There is nothing in the statute which can answer this question; and for aught contained in this statute, the property of a non-resident of the State, may as well be taxed in Buffalo as in New-York, or in Albany, and as well in the latter place, as in either of the former. No part of the statute, either directly or by implication, makes personal property taxable in the town or city where it may happen to be, whether it belong to a citizen or not.

And, finally, there is no clause which makes it the duty of the assessors, or which gives them authority to insert in the assessment roll, the name or personal property of any person, who is not an inhabitant of the town or ward; except so far as the provisions in relation to the land of non-residents, require that land so owned shall be taxed—[see *Van Rensselaer, v. Cottrell*, 7 *Barb.* 129, below referred to, that it is necessary to jurisdiction of assessors over personal property, that the owner be an inhabitant of the town or ward, &c.]

Whether it is wise and expedient, in view of the immense amounts of personal property employed in this city, in the various pursuits of trade, commerce, navigation and manufactures, by persons who have their residence just without our borders, that the State should subject it to taxation for the relief of our citizens; and whether to that end they should make the carrying on of such business here, a sufficient residence or inhabitancy, to subject such persons to this tax, is a question exclusively for the legislature. There is no doubt of their power, if they think its exercise will, upon the whole, be useful and proper. As the law now is, such persons are not inhabitants, nor, in my opinion, taxable as such.

I should not have deemed it at all necessary to discuss this question at so great length, but that the point was pressed by the counsel for the defendants on the argument, and that the common council of the city, appear by the complaint to have had the question urged upon them by the plaintiff, and to have persisted in the claim, that he is liable to taxation here. And the heavy burden of taxation borne by our citizens, render it in no wise remarkable, that the city authorities should be desirous of effecting a diminution of the burthen so far as they legally may, by extending it over all the property protected and fostered by that government, to the maintenance and support of which the taxes are applied. Nevertheless, in the further view which I have taken of the case before me, what I have said may be deemed unnecessary, because not essential to the determination which I am called upon to make.

The defendant's counsel further insist, that this case is not

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within the jurisdiction of this court, as a court of equity, and that upon this ground, the plaintiff must fail in this action.

The want of jurisdiction is not named as a ground of demurrer. The code of procedure, in section 144, provides that the defendant may demur to the complaint, when either of six causes of demurrer appear on the face of the complaint. The *first* of these causes is, "that the court has no jurisdiction of the person of the defendant, or of the subject of the action;" and the *sixth* is, "that the complaint does not state facts sufficient to constitute a cause of action;" and section 145 declares, that, unless the demurrer distinctly specifies the grounds of objection to the complaint, it may be disregarded.

The defendants here rest their demurrer solely upon the *sixth* ground above referred to.

It may well be doubted whether upon such a demurrer, the defendants were at liberty (had the objection been taken) to discuss the question of jurisdiction at all; and whether for the purposes of the issue of law made by the parties, they ought not to be deemed to have submitted to the jurisdiction of the Court. It would seem that the legislature intended that the demurrant should distinctly apprise his adversary of the precise question it was intended to discuss, and that the trial of an issue of law should be confined to the very ground of demurrer assigned. And the enumeration of the want of jurisdiction, being one of the six causes specifically mentioned, it should not be availed of as a ground of demurrer, unless the demurrer itself assigns it specially.

It is true that under section 148, the objection to the jurisdiction of the Court is not to be deemed *waived* by the omission to set it up, either by demurrer or even by answer; still it by no means follows, that it can be raised on the argument of a demurrer that assigns a different cause.

Whether if not so set up, the objection should only be permitted on the final hearing—or whether and how far it can be urged in any and what other stages of the cause, the code does not provide. But it is at least doubtful whether on the argument of a demurrer, (e. g. specifying for cause, "that several causes of action have been improperly joined,") the demurrant

should be permitted to depart at all from the very ground upon which the demurrer is based.

The judgment which the Court is called upon to give, is a judgment upon the very issue of law raised by the parties by their pleadings.

But the question of jurisdiction was discussed at length on the argument, and without objection on the part of the plaintiff. Probably upon a view of the subject which may be sound, viz: that the want of jurisdiction of the cause of action may be urged in any and all stages of an action, whatever may be the formal question before the Court. Though the form of the judgment upon the issue of law presented, might be somewhat embarrassing: If the Court are of opinion that the cause of demurrer assigned has no foundation, how can they give judgment for the demurrant upon that issue?

Possibly counsel suppose, that, notwithstanding the provisions requiring the demurrant to specify want of jurisdiction, when that is the ground of demurrer, yet that if it appears on the argument, that the cause is not one of equity cognizance, the plaintiff has not shown that in this action, and upon this complaint, he has a cause of action upon which the Court can give him any relief. This is a somewhat latitudinarian construction of the meaning of the code, not very satisfactory to my mind. The power of the Court over the subject, when the jurisdiction of the Court is voluntarily submitted to, cannot be questioned—it has often been exercised in this State, and relief given, as will appear hereafter.

I do not, however, wish to be understood as giving any decided opinion upon the construction of the code, or upon the rule to be observed in this particular. The counsel for both parties have concurred in submitting the question of jurisdiction as properly before me under their demurrers, and I may therefore properly dispose of the case upon that question.

And under the course of decision which has been had in this State in like cases, the precedents do not furnish a very satisfactory guide to a result. Upon a review of the subject, I am nevertheless brought to the conclusion that the plaintiff has mistaken his remedy, and that no amendment can be made

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which will entitle him to any relief of the nature sought by the present complaint.

Briefly, the reasons for this conclusion are, that by a wrong, such as is complained of here, no irreparable mischief is threatened—no cloud is thrown over the title to any real estate, which a court of equity may properly be prayed to remove—and the remedy is ample at law, without invoking the powers of the court as a court of equity, which alone are appealed to in this action.

IV. To trace the course of judicial decision in this State, and point out the mode in the various exigencies which may arise, in which an illegal assessment for taxes may be set aside or corrected, or its collection restrained, or the wrong done thereby be redressed, is not an easy labor. Upon a cursory inspection of the cases there will be seen to be no little conflict; but I apprehend that, in truth, there exists, notwithstanding intimations of doubt thrown out in some of the opinions, full remedy in all cases in which personal estate only is affected thereby.

1. The mode of rectifying such assessments by affidavit, while the assessment roll remains in the hands of the assessors; (1 Rev. Stats. 392–3. Laws of 1850, ch. 120;)—the notice they are required to publish to enable persons assessed to make such correction;—the review of such assessments by the board of assessors, or commissioners of taxes, on the application of any person conceiving himself aggrieved; (1 Rev. Stats. 393, and Laws of 1850, ch. 120.) The further power of the supervisors to correct the rolls and remit taxes, (p. 395, Laws of 1844, ch. 205, sec. 2, and Laws of 1850, ch. 120;)—need only be mentioned. In many respects, no doubt, their acts are final and conclusive. If their proceedings are regular, and they act within the scope of their jurisdiction, following the directions of the statute, no mere error in the valuation of the property of a taxable inhabitant, or in the exercise of their discretion, or in determining the weight or sufficiency of evidence laid before them, can, I apprehend, be reviewed by any tribunal.

But if they impose a tax upon property, which is not by law taxable, or assess a person who is not liable to assessment, or

if they commit errors by making up the assessment without complying with the essential requirements of the statute, or make an illegal apportionment of the taxes imposed, and whether the illegality of the acts appears on the face of their proceedings, or arises from extrinsic facts to be proved *dehors* the proceedings themselves, I have no doubt a review may be had, or redress may be obtained.

2. Whether a *certiorari* will lie, and such review be had thereon, and the extent of such review, has been much discussed; if, however, a review be had by *certiorari*, it can, (according to the opinions given in the cases mentioned below,) only reach such illegalities as are apparent upon the proceedings themselves, (*The People v. The Mayor, &c. of New York*, 2 *Hill*, 9, and the Matter of Mount Morris Square, 2 *Hill*, 27-8, and cases cited,) and it seems questionable whether, after the assessment rolls have gone into the hands of the collector, and the warrant has issued, any review by *certiorari* would avail to stay the collection of the tax.

That the Supreme Court have power to grant such a writ, and thereupon to review the proceedings, is, however, settled. Such writ was granted in *Storm v. Odell*, (2 *Wend.* 287,) to review the assessments for a school tax, and in *Caledonian Company v. Trustees of Hoosick Falls*, (7 *Wend.* 508, and note on 665,) to review the assessments for a village tax, (and see effect, &c. in cases cited in the note.) But in *Lawton v. Commissioners of Cambridge*, the court say: "though the power of the court is indisputable;" there are cases in which they will not interfere. In the case of a poor rate, they will refuse the writ, as also in the assessment of a land tax, from a regard to the public convenience, (cites 2 *T. R.* 235, which refers to 2 *Strange*, 932 and 975.)

In *The People v. the Supervisors of Alleghany*, 15 *Wend.* 198, and *The People v. Supervisors of Queens*, 1 *Hill*, 196, and *The People v. the Mayor, &c. of New York*, 2 *Hill*, 9, the subject is discussed at great length, and although the power of the court to issue the writ, and review the proceedings is asserted, yet it is declared to issue, not *ex debito justitiæ*, but to be a matter within the discretion of the court, and the writ was refused. In these cases the illegality alleged the allow-



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ance of improper county and town charges, which increased the amount to be raised by taxation. The remarks of the court indicate that in general such writ ought not to be allowed, by reason of the great public inconvenience it must occasion. And it appears, by the report of *Mooers v. Smedley*, 6 *Johns. Ch. R.* 30, that the Supreme Court had refused the writ in a like case, many years before. In the matter of Mount Morris Square, 2 Hill, 14, where a writ of certiorari was applied for, to review an assessment for opening a public square was sought, the court took the same view of the subject, and Judge Cowen says:

"In general we ought not to allow the writ where assessments of taxes are in question, which affect any considerable number of persons. If there be a *want of jurisdiction*, even in the judicial act sought to be reviewed, or, in other words, if there be an excess of legal power by which any person's rights may be injuriously affected, an action lies, and it is much better that he should be put to this remedy, than that the *whole proceeding* should be arrested, and perhaps finally reversed for such a cause." And yet, in the *People v. the Mayor &c. of Brooklyn*, the proceedings in an assessment for a sewer, of the same nature as the case last cited, were removed to the Supreme Court by certiorari, and reversed or annulled; (6 *Barb.* 209.) And like proceedings for the grading of a street, were in the same manner removed and annulled, between the same parties; (9 *Barb.* 535.) And still another, between the same parties, was in like manner reversed, which is not reported from that court. The case last referred to, was appealed to the Court of Appeals, and the decision reversed upon the merits, and not upon the ground that the proceedings might not be so annulled on certiorari, but Justice Ruggles, in giving the opinion of the court, makes this suggestion:—"It is well settled, that upon a common law certiorari, the court will not examine the proceedings returned, further than to ascertain whether the inferior tribunal has kept within its jurisdictional limits." (4 *Comst.* 441.)

In *Chegaray v. Jenkins*, (1 *Selden*, 382,) the same member of the Court of Appeals, waives the consideration of the question, whether an erroneous assessment of taxes upon real

estate not liable to taxation, can be corrected on certiorari; and in *Morewood v. Hollister*, (2 *Selden*, 309,) in the same Court, in discussing the proceeding by common law certiorari, it is said:—"The Court of Review, in such cases, only examines to see if the officer acquired jurisdiction, and acted, during the whole proceedings, within the limits of the jurisdiction acquired."

In most of the cases above referred to, and in *Van Rensselaer v. Cottrell*, (7 *Barb.* 127,) and in *Same v. Whitbeck*, (*ib.* 133,) *Weaver v. Devendolf*, (3 *Denio*, 119,) and *Sheldon v. Van Buskirk*, (2 *Comst.* 473,) the making of the assessment is declared to be a judicial act; and although it is within the power of the court, and the province of the writ of certiorari, to bring such proceedings under review, it is manifestly according to the course of the decisions referred to, to confine the exercise of the power of the court, in such cases, within very narrow limits, and in general to withhold it.

So far as this branch of the discussion bears upon the case before me, it is manifest that a certiorari could be of no avail to the present plaintiff. His complaint avers, that he had no notice of the assessment before a warrant to the receiver of taxes to collect the tax was issued—and not being a resident of the State, he was not chargeable with any notice by reason of any posting of notices by the assessors, in the ward in which he was taxed. If the proceedings were removed by certiorari, no want of jurisdiction would appear on their face, and the cases above referred to, seem to show that no proof of extrinsic facts could be taken in the court of review, for the purpose of showing the want of jurisdiction or other illegality.\* And

\* NOTE.—See an elaborate opinion on the office of a common law certiorari, by Ch. J. Kinsey, in *The State v. Middlesex*, *Coxe Rep.* 244, in which the Supreme Court of New Jersey received evidence of facts not appearing on the record. And in the case of the *New Jersey Railroad Co. v. Suydam*, 2 *Harr.* 25, and cases therein cited, it is held that where a certiorari issues to *Commissioners*, or other *quasi judicial officers*, the court may order or permit proofs to be taken of extrinsic facts, showing the proceedings to be illegal, though they will not inquire into the merits of any matter within the jurisdiction of the subordinate tribunal. I did not, however, think it necessary to pursue that inquiry further than to report what is said in the cases in our own State, and yet the practice in New Jersey seems to me calculated to secure the ends of justice, and to be quite consistent with the proper office of this writ. W.

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besides, according to the opinions in the above two cases cited from 15 *Wend.* 198, and 1 *Hill*, 196, such certiorari would not operate to prevent the execution of the warrant which issued before the plaintiff had notice, and therefore, before the certiorari could have been obtained.

3. However imperfect or inadequate the remedy by certiorari may be, it is said that a *mandamus* is proper where a party has a legal right, and there is no other appropriate legal remedy, and where, in justice, there ought to be one; (See 12 *Johns. R.* 414, *The People v. The Supervisors of Albany*; *ex parte Nelson*, 1 *Cow.* 417; *Hull v. Supervisors of Oneida*, 19 *Johns. R.* 260; *Bright v. Supervisors of Chenango*, 18 *Johns. R.* 242.) In these cases, jurisdiction by mandamus was entertained, to compel the supervisors to allow county charges;—in one of them made peremptory, and in two denied on the merits—showing that those bodies who control the subject to which this suit relates, may properly be reached by mandamus, and in a matter of strict right, not resting in their discretion, may be compelled to conform their proceedings to such strict legal right of the party applying, to prevent injustice.

In the *People v. The Mayor, &c. of New-York*, 10 *Wend.* 393, a mandamus was applied for to compel the defendants to execute and deliver a lease on a sale of land for assessments, and the court held the remedy appropriate, although upon the merits of that case they refused it.

In the *Bank of Utica v. City of Utica*, in which the legality of an assessment for taxes on personal property of the defendants, which they claimed was not liable to taxation, was the distinct matter in controversy. The Chancellor says, (4 *Paige*, 400,) "I think the complainants had a perfect remedy at law, by an application to the Supreme Court for a mandamus to compel the common council," (who, by their charter, have exclusive control of the assessment and collection of the city taxes,) "to correct their assessments and taxation if it was illegal."

In *The People v. The Supervisors of New-York*, 18 *Wend.* 605, a mandamus was applied for to compel the defendants to strike from the tax list and from the warrant to the collector,

the names of the relators. The power of the court to order such correction of the tax list, while such list remained within the control of the defendants, seems not to have been doubted, though the application was denied on the merits, and the court intimate that under the particular statute relied upon by the plaintiffs, there was a discretion given to the defendants, or a finding, upon the sufficiency of proof to their satisfaction, to be had, in relation to which the court could not interfere.

In *The People v. The Assessors of Watertown*, 1 *Hill*, 616, a mandamus to compel the assessors to strike out of the assessment roll for taxes, an assessment upon the personal property of the relators, no doubt of the power of the court to make the order, or of the appropriateness of the remedy was suggested, but the court denied the motion on the merits.

In *The People v. The Supervisors of Niagara*, 4 *Hill*, 20, the defendants had struck from the roll of assessments for taxes, certain three corporations, and the relators (being tax-payers) moved for a mandamus to compel the defendants to restore those names to the assessment rolls; the motion was heard on the merits. No objection was made to the form of the remedy, (all formal objections being waived,) and a peremptory mandamus was ordered by the court.

It appears by the report of *Mooers v. Smedley*, 6 *Johns. Ch. R.* 27, that where the error complained of was the allowance, by the supervisors, of alleged improper county charges, the Supreme Court refused a mandamus, but on what ground, is not stated. It may have been upon the merits, or possibly because, the warrant having already issued, the collector, as a merely ministerial officer, could not be reached thereby. But the learned Chancellor Kent, in that case, says, "the superintending control in these cases has always been exercised by the Court of Kings Bench, and no where else, and that court has proceeded by certiorari, mandamus, prohibition, information," &c.

In *The People v. Supervisors of Queens*, 1 *Hill*, 196, above referred to, (in which the error complained of was also the allowance of alleged improper county charges,) the motion was in the alternative for "a certiorari, prohibition, mandamus, or some other writ, process, order," &c. "for the relief of the

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relator and other tax-payers," &c.; but it appearing that the *warrant had issued*, and was in the hands of the collector; the subject of issuing a mandamus for the correction of the errors, was disposed of by Justice Bronson, by the remark, "I do not see what use can be made of the writ of mandamus in a case like this." And the judge, after stating that motions of this kind are addressed to the discretion of the court, proceeds to consider the propriety of allowing a certiorari, (as above stated,) and having first come to the conclusion that some of the objections to the proceedings have no foundation, and that as to the propriety of the charges objected to, the certiorari would be of no avail, because the supervisors would return, by their finding, that they are proper charges, re-affirms the decision in the *People v. Supervisors of Alleghany*, 15 *Wend.* 198, "that the errors of the Supervisors, in these particulars, cannot be corrected without great public inconvenience, and denied the writ."

The particular circumstances in *Mooers v. Smedley* and the *People v. Queens*, doubtless warranted the denial of the writ. But they are not inconsistent with the opinion that this writ may often be appropriately used when the assessment rolls are still within the control of the proper body, and they are exceeding their jurisdiction or violating the clear legal right of an individual, by imposing upon him an illegal tax, where they have no discretion to exercise. The other cases above referred to, appear to me to warrant this opinion, and where the party has no other legal remedy, his right to have such writ allowed is, I think, undeniable. See 1 *Hill*, 362, *Coxe R.* 250, 252.

It is, however, apparent from what has been said, that the present defendant, having no notice of the assessment in this case until after the warrant issued for the collection of tax issued, could not, according to the views of Judge Bronson, have made a mandamus available to prevent the levying of the tax by the collector. The supervisors had terminated their action on the subject, and transmitted the rolls to the collecting officers; and though they may have had a discretionary power to remit a tax, I apprehend that in doing so, they would have acted in no judicial character, but in the exer-

cise of a discretion, governed by their sense of justice, in which they could not be controlled.

4. The relator, in the case last above referred to, also asked for a writ of *prohibition* to the *town collector* to stay the levying of the tax. This was denied on the ground that such writ does not lie to a ministerial officer to stay the execution of process in his hands—that it is directed to a *court* and to the *party* prosecuting an action or legal proceeding therein. (1 *Hill*, 205.) See the cases cited.

And yet in *The People v. Works* there referred to, (7 *Wend.* 486,) the writ of prohibition was granted commanding the collector of taxes to desist and refrain from collecting a town tax, and directing the supervisor of the town not to receive the sum assessed, and not to pay it over if received. The ground of the decision on the merits was, that the tax was illegally voted at a special town meeting, at which they had no power to act on the subject, and also that it was raised for an illegal purpose, and the court deemed this an appropriate remedy, and one provided by the common law against the encroachment of jurisdiction, to keep inferior courts and tribunals within the limits and bounds prescribed to them. This decision, however, is regarded by Judge Bronson as no authority for the allowance of the writ, though the point was distinctly decided. In the cases mentioned above, as already suggested, the acts of the assessors are said to be judicial, and there would seem no reason in the nature of the proceedings for not addressing this writ to them, and in regarding them, though not a court, in name, as liable to be restrained in an excess of jurisdiction when they exceed its limits. In *Breedon v. Gill*, 5 *Mod.* 272, the Commissioners of Appeal, on the imposition of an excise, were deemed a tribunal to be restrained by such a writ, and were restrained by the Court of King's Bench. And it would seem that in South Carolina the collection of a tax has been restrained in the same manner, *Buyn v. Carter*, 1 *McMillan*, 410—under what precise circumstances, I have not been able to learn. In view, however, of the decision in the Supreme Court in 1 *Hill*, 196, which is certainly in accordance with the proper office of this writ, so far as it was then sought to address it to a *ministerial officer*, it is apparent

that the writ, if it be allowable at all, must be obtained while there is some act to be done or omitted by the assessors themselves or the supervisors. And in the present case, the want of notice and the fact of non-residence renders such a resort of no avail to this defendant, unless the prohibition can be made to restrain the execution of the warrant, which, according to the case last mentioned, it cannot.

5. There are other modes in which, if the injury caused by an illegal assessment cannot, in a particular case, be prevented by either of the proceedings above adverted, it may nevertheless be fully redressed, and by action at law. Each case in this respect, however, depending upon its own circumstances.

It was argued by the defendants' counsel, that if the assessments be illegal, all parties attempting to enforce its collection are trespassers, and besides, that the purchaser at a sale under the warrant of distress would take no title.

This proposition is wholly unwarranted, and is opposed to the best settled rules of law on this subject.

When the warrant is regular, and no illegality and no want of jurisdiction in the authority by whom it was issued appears on its face, the officer is fully protected, and this is true of the warrant complained of in this action.

It is only where the illegality or want of authority, appears on the face of the warrant itself, that it fails to protect the officer to whom it is directed for execution.

In *The People v. Albany C. P.* 7 *Wend.* 485, the warrant is declared to authorize the taking of goods by the officer.

In *The Columbian Manufacturing Co. v. Vanderpool*, 4 *Cow.* 556, trespass was brought against the collector, upon the ground that by law, the property of a manufacturer of cotton, &c. was exempt from taxation; no question of the liability of the collector appears to have been raised, and the action was decided upon the ground that the plaintiffs were properly taxed, which question was alone discussed.

In *Wheeler v. Anthony*, 10 *Wend.* 346, which was also trespass against the collector, the imperfection in the tax list and warrant referring thereto, were not such as to deprive the defendant of his justification of the taking.

In *The Bank of Utica v. City of Utica*, 4 *Paige*, 400, the

the chancellor says, that where, as in that case, the illegality *appears on the face of the warrant*, the complainants have an adequate and certain remedy at law by an action of trespass if the warrant be enforced by a sale, &c.

And in *Sheldon v. Van Buskirk*, 2 *Comst.* 475, which was also trespass against a collector of taxes, it was held by the Court of Appeals, that the warrant being on its face in proper legal form, and issued by persons having lawful authority to make and issue a warrant for such a purpose, the officer was protected thereby. See to the like effect, *Van Rensselaer v. Cottrell*, 7 *Barb.* 132, and same *v. Whitbeck*, *ib.* 143. And still more recently in the same court, in *Chegaray v. Jenkins*, 1 *Seld.* 382, on appeal from the judgment of the Superior Court of this city, (3 *Sand.* 409,) it is held, that the warrant having been issued by the proper officers, and there being nothing on its face showing a want of authority in the assessors to make the assessment complained of, or in the supervisors in confirming it, or the receiver of taxes in issuing the warrant, and being in due form of law, it was a perfect justification to the officer, even although the tax was illegally imposed upon the plaintiff's property.

6. The assessors themselves, however, and in some cases, the parties by whom the original warrant for the collection of the tax is issued, may be liable. Their acts, so far as they exceed their jurisdiction, do not protect them from liability to make full reparation for any injury which results therefrom.

It was indeed argued on the hearing, that they have exclusive jurisdiction to determine who are taxable inhabitants, and what is taxable property, and if so, their acts are conclusive and final. Such a rule could not be tolerated, and is not at all sustained by the cases cited to support the proposition, and this sufficiently appears by a series of decisions in this State.

In *Saunders v. Springsteen*, 4 *Wend.* 429, the defendants, as assessors of the town of Lewiston, assessed the plaintiff's land, which, by law, was not taxable in that town, and the tax was collected. In an action on the case against them, they were held liable, and the judgment was affirmed in the Supreme Court.

In *The Ontario Bank v. Bunnell*, 10 *Wend.* 186, trespass



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was brought against the trustees of a village. The court held, that the plaintiffs were liable to be taxed in the village, and the plaintiffs therefore failed; but no doubt was suggested that if the plaintiffs had not been taxable, a recovery might have been had. And in this case, the true distinction between cases in which a liability does and does not exist, is alluded to, viz: that in so far as the error consisted in an over estimate of the amount, where the party is, in fact, a taxable inhabitant, such error could not avail in such an action. That matter was within the jurisdiction of the assessors, and to be otherwise corrected, if they erred. (See also 4 *Wend.* 223, and 18 *Wend.* 608.) In the matter of Mount Morris Square above referred to, (2 *Hill*, 29,) the court says, if there be a want of jurisdiction, or an excess of legal power, even though the act be judicial in its nature, an action lies.

In *Smith v. Randall*, 3 *Hill*, 497, the trustees of a school district were sued in trespass; but the alleged error was in the warrant itself, under which the property was taken.

In *Gale v. Mead*, 4 *Hill*, 109, 238, the defendants were sued in trover for a horse, taken by a tax collector, under a warrant issued by them as trustees, for a school tax, and the court being of opinion that the assessment and tax list made by them was illegal, they were held liable.

In *Weaver v. Devendorf*, 3 *Den.* 120, also an action against trustees, taken by a tax collector, under a warrant issued by the defendants, to collect an assessment made by them, upon the plaintiff's property; the distinction above alluded to is maintained; that the defendants as assessors, had jurisdiction of all the taxable inhabitants in the town, and therefore of the plaintiff and his property, and for an error in judgment in fixing its value are not responsible; but that this exemption from liability only exists where there is jurisdiction of the particular case, and if the limits of their authority be transcended, they are responsible for all the consequences.

In *Prosser v. Secor*, 5 *Barb.* 607, the *application* of this rule, made in the last case, is questioned and condemned; but the rule itself is even more strenuously insisted upon. And it is held that assessors have no authority to enter any person's name on the assessment roll, whose property is by law exempt

from taxation, or to impose any assessment thereon ; that they have no jurisdiction whatever over such persons or their property. The court add that the assessment of the value is a judicial act, upon which a common law certiorari will lie ; and that inferior tribunals are bound to see that their acts are within the scope of their authority. They could not, by deciding, themselves, that the plaintiff was a taxable inhabitant, bring him within their jurisdiction. No officer can acquire jurisdiction by deciding that he has it. This was an action on the case, against the assessors of a town, and they were held responsible for the taxes illegally assessed and levied, and collected from the plaintiff.

In *Van Rensselaer v. Cottrell*, 7 *Barb.* 127, Justice Harris says the only fact necessary to the jurisdiction of the assessors, is in reference to personal property, that the owner be an inhabitant of the town or ward, and if they should assume to assess lands lying in another town, or to assess an inhabitant of another town for personal property, though it might be situated in their town, the act of the assessors would unquestionably be void for want of jurisdiction. The case of *Van Rensselaer v. Whitbeck*, *ib.* 183, decided by the same judge, at first perusal, seemed to conflict with the one last cited, since there, the plaintiff objected that he was assessed for rents in Greenbush as personal estate, when, in fact, he resided elsewhere ; and yet the assessment was sustained. But on examining the statute (*Laws of 1846, ch. 327*) under which rents are taxed, it will be seen that though taxed as personal estate, they are directed to be taxed in the town within which the lands demised may lie, and in the same manner and to the same extent as any personal estate of the inhabitants of the town. No respect (in reference to this species of property,) is had to the residence of the owner, and so far as relates to the jurisdiction of the assessors to include it in the assessment, it is treated as if it were a part of the land out of which it issues.

I understand the same view of the effect of the decision of the assessors, upon the question of their own jurisdiction, to be stated by Ruggles, Chief Justice, in his opinion in the Court of Appeals, in *Chegaray v. Jenkins*, (1 *Seld.* 381.) Though he held the collector protected by the warrant, he says, "the

decision of the assessors on a question in which their own authority to act was involved," (*i. e.* upon the question whether the property in question could by law be assessed,) "was not for all purposes conclusive;" and even "in collateral actions their judgments may be questioned and disregarded, if it appear that in fact they had no authority to act in the given case." Upon this reference to the cases in this State, and in view of what I conceive to be just, as well as in conformity with sound principle, I can not doubt that assessors are liable for inserting in the assessment roll the name of a person who is not an inhabitant of the town or ward. It is their duty to ascertain who are inhabitants of the town or ward, and it is only as to such that they have any authority whatever as assessors of personal property. This may sometimes be difficult, but every office brings with it duties and responsibilities, and it is not just to those who may be prejudiced, nor wise as it respects the public, that an officer who exceeds his authority, should not be liable for the consequences. The insertion of the name of an individual in the assessment roll, is an affirmative act, and the assessor is not under any duty to make such insertion, till he knows the facts upon which the liability of such person depends; and to hold assessors irresponsible, when, through want of proper information, they assess non-residents for personal property, might lead to great abuse. And to say, further, that the decision of the assessor himself, is conclusive, would enable a town or county to tax half the inhabitants of the United States, and so far as property of the latter could be found in the county, collect the tax by distress and sale. If assessors attempt this, I think them liable for all the damages resulting from their unauthorized act.

How far the supervisors are also liable for lending to such illegal act their authority, may, perhaps, depend upon the question whether they have actual notice of the illegality.

7. I apprehend that the remedy of a party illegally assessed—that is, assessed when there is no legal right to impose any tax upon him—does not cease here. If such tax be collected by distress and sale of his goods, or if upon the levying of a warrant, he pays the tax to save his property, he may, I think, sue for and recover back the money so paid; and that in

such case, the body to whom the tax is paid by the collector, are responsible. If this be so, the allegation in the complaint herein, that the defendants, Jenkins, the constable, and Hart, receiver of taxes, are not of sufficient responsibility, &c. does not add any material fact to the plaintiff's case.

The money is obtained in such case by duress of the plaintiff's property, which may, when paid, be recovered back. It is an illegal exaction without right, and gives the party, for whose benefit, or by whose authority it is obtained, no title.

In other States, the precise proposition, that if one pays taxes that are illegally assessed upon him, he may recover back the money is adjudged. *A. & C. Manufacturing Company v. Inhabitants of Amesbury*, 17 *Mass.* 461; *Perry v. Dover*, 12 *Pick.* 206; *Sumner v. Parish in Dorchester*, 4 *ib.* 341; *Atwater v. Woodbridge*, 6 *Conn.* 223; *Preston v. Boston*, 12 *Pick.* 7; *Adams v. Litchfield*, 10 *Conn.* 127; *Boston and S. Glass Company v. Boston*, 4 *Met.* 181; *Dow v. Sudbury*, 5 *Met.* 73; *Torrey v. Milbury*, 21 *Pick.* 64; *Joyner v. Third School District in Egremont*, 3 *Cush.* 567.

Decisions in somewhat analagous cases of payment by duress of property, may be found in *Ripley v. Gilston*, 9 *Johns. R.* 201; *Clinton v. Strong*, *ib.* 370; *Elliott v. Swartwout*, 10 *Pet.* 137; *Bates v. New York Insurance Company*, 3 *Johns. C.* 238; and see *Harmony v. Bingham*, 1 *Duer*, 209.

Actions to recover back money paid for taxes alleged to be illegal, have frequently been brought in this State, and in actions brought in other forms, the right to maintain assumpsit is adverted to. Thus in *Seaman v. Benson*, 4 *Barb.* 448, where the plaintiff failed in the action of trover, the court says:—"If the plaintiff's property was taken and sold for too much, his remedy was not in trespass or trover, but in case for the injury sustained, or in assumpsit against the trustees of the school district, for the excess of the moneys, &c." In *Fleetwood v. The City of New York*, 2 *Sand.* 481, which was brought to recover back money paid to redeem land sold for assessments, the court held the plaintiff not entitled to recover, because if the assessment was illegal, there was no lien, and therefore no duress nor compulsion; and the court adverts to the distinction, and to the cases in which duress of personal

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property, upon seizure thereof by public officers, under process or warrant of law, constitutes such compulsion, that the money paid for its relief, may be recovered back.

In *Re Contenix v. Supervisors of Erie*, 7 *Barb.* 249, action was brought to recover back money paid upon an alleged illegal assessment for personal estate, and no question was made of the liability of the defendants if the tax was illegal, though the case was decided in their favor by sustaining the legality of the tax.

And in the *Mutual Insurance Company of Buffalo v. the Supervisors of Erie*, 4 *Comst.* 442, the action was the same, and was decided upon the same ground. No doubt was suggested but that the action would lie; and Gardiner, J. says:—"The *only question in this cause* is whether the appellant, as a corporation, is subject to taxation according to the laws of this State."

V. This protracted review of the subject, I think, sufficiently shows that the plaintiff in this case is not without remedy at law, and that in some or one of the modes indicated he can obtain redress, or could have had a remedy adequate to his protection.

There can be no pretence of irreparable mischief—the proceeding can only take a certain number of dollars from his pocket, or, at the worst, personal property of a definite ascertainable value, and in presumption of law and of equity also, a like sum will be a full compensation to him.

The apprehended insolvency of Jenkins and Hart above alluded to, furnishes no ground for equitable interference, for the reason above suggested.

And it is not claimed that any real estate is affected by the acts of the defendant, the title to which is affected or obscured.

I cannot, therefore, perceive any ground for the interference of a court of equity as such. Nor that there is a case here which can be classed under any head of equity jurisdiction. And although there are cases in which jurisdiction in equity has in this State been entertained, so that there is not here perfect consistency in this respect, yet the current of the decisions is, I think clearly against the relief which the plaintiff here seeks.

In *Moors v. Smedley*, 6 *John. Ch. R.* p. 28, Chancellor Kent refused to enjoin the collection of an alleged illegal assessment.

Whether the illegality appeared upon the face of the proceedings or not, does not distinctly appear; but the alleged error consisting in the allowance of improper town charges, he wholly disclaimed any jurisdiction over the supervisors to review their determination, whether legal or not, and declares the superintending control to be in a court of law, as herein above cited.

In *Thompson v. Ebbets*, 1 *Hop. R.* 272, where the complainant was assessed in two places; he was permitted to interplead the two collectors of the taxes, and leave them to contest the legality of their respective claims to the tax on his personal estate, upon the question of residence. But no objection was raised to the jurisdiction, and the action was entertained simply as an interpleading suit.

In the *Mohawk & Hudson River Railroad Company v. Clute*, 4 *Paige*, 384, where also the complainant had been taxed in two places; the bill as a simple bill of interpleader, was regarded as defective in form and insufficient on the merits. The chancellor, however, entertained it for the purpose of an injunction as to one of the defendants whose assessment was illegal. But no objection to his jurisdiction was made, and the subsequent decisions of the chancellor show that if he considered the question of jurisdiction at all, he must have retained the cause, upon some ground peculiar to the case of a complainant taxed in two towns on the same property.

For in *The Bank of Utica v. City of Utica*, 4 *Paige*, 399, the chancellor—distinctly stating that the complainants have a perfect remedy at law,—finds himself bound to take jurisdiction, because the parties had stipulated to waive the objection, and thereupon he enjoined the defendants to prevent the collection of an illegal tax.

In *Wiggin v. the Mayor, &c. of New-York*, 9 *Paige*, 16, the chancellor held that he would not restrain the collection of an assessment for opening a street, to correct an error in the estimate of damages. Nor if the proceedings were void on

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their face, would he interfere, on the claim that the proceedings created an apparent lien on the real estate assessed therefor, and a cloud on the title.

And having, in 1840, in *Meserole v. Mayor, &c.* of Brooklyn, 8 *Paige*, R. 198, enjoined the defendants against the collection of an assessment for a street, on the ground that the opening was without authority,—placing his interference, however, under an admitted head of equity jurisdiction, the removal of a cloud upon the defendant's title to real estate,—the Court of Errors reversed his decision, (26 *Wend.* 132,) denying to the Court of Chancery jurisdiction over the proceedings for laying out of streets, for the purpose of reviewing them or setting them aside, and declaring that such jurisdiction appertains exclusively to the Supreme Court, (then a court of law only,) admitting, however, of two exceptions, *i. e.* where irreparable injury or multiplicity of suits will follow, beyond the power of courts of law to redress.

In *The Farmers' Loan and Trust Company v. The Mayor, &c.* 7 *Hill*, 261, on appeal from the chancellor, a bill to restrain the collection of a tax on personal property, alleged to be illegal, was entertained, on the distinct ground that the parties having stipulated to waive all objections to the jurisdiction, the Court of Chancery was “not at liberty to decline the consideration of a question *which appropriately belongs to courts of law.*”

In *Van Doren v. The Mayor, &c.* 9 *Paige*, 388, the chancellor expresses his concurrence in the reversal of *Meserole v. Brooklyn*, 24 *Wend. supra*, but asserts jurisdiction, where, by reason of matters not appearing upon the face of the proceedings, an assessment for a street was illegal; but in such case only when a cloud upon the title to real estate was created by the assessment, citing *Simpson v. Lord Howden*, 3 *Mylne & C.* 97.

In *The Utica Manufacturing Company, v. The Supervisors of Oneida County*, 1 *Barb. Ch. R.* 432, on appeal from a decretal order overruling a demurrer to the bill, filed to restrain the collection of an illegal tax, the chancellor affirmed the order; but he says expressly, that no such question being raised by defendant's counsel, he has not considered whether

it is a proper case of equity cognizance, or whether the complainant had a perfect remedy at law, by mandamus, to compel the defendants to strike the name of the complainant from the assessment roll.

In *Livingston v. Hollenbeck*, 4 *Barb. R.* 10, the Superior Court in Equity hold distinctly on a bill filed to restrain the collection of a tax, that they have no power to interfere, and that the plaintiff has his remedy at law; and in *Van Rensselaer v. Kidd*, *ib.* 17, the same doctrine is repeated.

In *Boreel v. The Mayor, &c.* 2 *Sand.* 552, the Superior Court of the city of New-York entertained a bill to restrain the defendants from giving a lease on a sale for taxes, and from selling for other taxes and assessing taxes in future, where the property taxed was adjudged not liable to taxation, though the bill was demurred to for want of equity. The question of jurisdiction was not discussed, but the question of exemption from taxation only. The decision is hardly consistent with that of the Court of Errors, above referred to.

In *The Sun Mutual Insurance Company v. The Mayor, &c.* 8 *Barb.* 450, the bill was filed to restrain the collection of a tax on personal property, for which a warrant had been issued, and a levy made, an injunction was granted at special term, but dissolved, on appeal upon the merits; but it would seem that no question of jurisdiction was intended to be raised—at all events, the court do not pass upon that question. Whether it was conceded, or taken for granted by the court, does not appear.

And in *The Albany and Schenectady Railroad Company v. Osborn*, 12 *Barb.* 223, though the court entertained the question of the legality of the tax, it appears to have been considered and decided, because that was agreed upon as the sole question in the case—objection to the jurisdiction being thus waived.

So in *The Sun Mutual Insurance Company v. The Mayor*, 5 *Sand.* 10, the question of the legality of a tax on personal estate, was considered in equity, after the warrant was issued to the collector, and decided on the merits; but it does not appear that the question of jurisdiction was argued or considered by the court.



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Wilson *a.* The Mayor of New-York.

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And in *Bartlett v. The Mayor, &c.* 2 *Sand.* 44, where an injunction was applied for, on the distinct ground that the plaintiff was not a resident of this city, and was illegally taxed here, the case was considered upon the merits, and the plaintiff was deemed a resident, within the meaning of the act of 1850. (*Laws of 1850, ch. 92.*)

The jurisdiction of the court would seem to have been taken for granted. But as the question does not appear to have been raised, the case cannot be deemed an authority in support of the jurisdiction, in opposition to the previous cases.

And in the case of *Bouton v. The City of Brooklyn*, 7 *How. Pr. R.* 198, where the Supreme Court of the Second District were applied to, for an injunction, to restrain the collection of an alleged illegal assessment, upon real estate for a public park, that court held on demurrer, that the plaintiff had a remedy at law, and that a court of equity would not interfere, even to remove a cloud upon the title to the lands assessed in such a case.

And see also a decision, to the like effect, in *Thatcher v. Dusenbury*, 9 *How. Pr. R.* 32.

Entertaining the views, which I have stated above, and believing that they are in conformity with the decisions heretofore made when the point has been presented, I am constrained to hold, that to restrain the collection of a tax upon personal estate, on the grounds alleged in the complaint herein, a court of equity has no jurisdiction.

Assuming it as conceded, that the question of jurisdiction was properly raised by the demurrers, (notwithstanding the suggestions above intimated,) the defendants may have judgment on the demurrers, with the usual leave to the plaintiff to amend (if he deems an amendment possible) on the usual terms.\*

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\* Although this cause was decided in July, 1854, the opinion was not filed until recently. The same question has been since mooted in the Supreme Court, in *The Chemical Bank a. The Mayor, &c.*, (see *post.*) and in the New York Superior Court, in *The New York Life Insurance Co. a. The Board of Supervisors*, lately decided at general term. In both cases the injunction was denied.

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Purple *a.* The Hudson River Railroad Company.

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PURPLE *a.* THE HUDSON RIVER R. R. CO.

*New York Superior Court ; General Term, October, 1854.*

ASSIGNMENT OF CAUSE OF ACTION.—TORTS.

The rule of law that a cause of action founded on injuries to the person is not assignable, has not been altered by the Code.

Demurrer to complaint.

This action was instituted by S. S. Purple, assignee of Minerva Purple. The complaint alleged that the defendants contracted to carry Minerva Purple from Greenbush to Canal-street, and deliver her there in safety ; that she was violently thrown from the car when landing, by reason of its being started improperly, whereby she was severely injured : and that she had assigned the cause of action to the present plaintiff. To this complaint the defendants demurred on the ground that the cause was not assignable. The demurrer was sustained at special term, and the plaintiff appealed to the general term.

*Geo. Betts*, for plaintiff.

*W. Fullerton*, for defendants.

DUER, J.—We are clearly of opinion that the decision at special term is correct.

It is true in all cases, as the law stood before the Code, that where an action was brought against a common carrier, or against a person engaged to transport another for hire, the party had his election whether to bring his action for assumpsit founded upon a breach of contract or an action of tort ; but whatever may have been the nature of the action where it was brought to recover for injuries to the person—an injury resulting from the carelessness or negligence of the party sued—we think that tort was substantially the true cause of action, and therefore it was not assignable. It seems to have been

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Mahaney *a.* Penman.

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understood by many members of the bar that the Code authorizes an assignee to maintain an action in his own name, and that in all cases where right of action exists in a party, that right may be assigned. The law in that respect has not been altered. An assignee where an assignment is valid according to the rules of law as they formerly existed, may maintain an action in his own name, but when a cause of action is a simple tort, and for a special injury to the person, it is not more assignable under the Code than it was under the laws that formerly prevailed.

Judgment, therefore, must be affirmed, with costs.

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MAHANEY *a.* PENMAN.

[*New York Superior Court: Special Term, October, 1854.*]

JURISDICTION OF THE SUPERIOR COURT.—JOINT LIABILITY UPON  
CONTRACT.

A defendant cannot appear in the New York Superior Court, under protest to the jurisdiction, based on a purely personal objection.

The proceedings authorized by the Code to be taken in suits brought against defendants jointly liable upon contract, may be taken in a suit brought upon a judgment rendered against defendants, jointly, upon a contract on which they were jointly liable.

Motion for a new trial.

The action was brought by Mahaney against three defendants, upon a judgment rendered in his favor against them in the State of Virginia. The grounds of the motion sufficiently appear in the opinion of the court.

*J. Livingston*, for plaintiff.

*B. Galbraith*, for defendant.

HOFFMAN, J., (with concurrence of OAKLEY, C. J. and DUEB, J.)—On the 22d of April, 1850, the plaintiff recovered a judgment against the defendants, in a court, described as the

"Circuit Superior Court of Law and Chancery, for Frederick County, in the State of Virginia," for \$800, with legal interest, until paid, and his costs.

The plaintiff avers in his complaint, that such court was a Court of Record of the State of Virginia; that he is the owner of the judgment, and that the defendant is indebted to him the sum of \$800, with interest, for which he prays judgment.

The defendant, Daniel Penman, by answer, reserves the right to object to the jurisdiction; and, that the plaintiff shows no cause of action. He then, 1st, denies the recovery of the judgment in the court as alleged. 2d. He says that there was no such court known at the alleged time as the court described. 3d. That such described court was not a court of record. 4th. That there was not, at the time alleged, any such judgment of such court valid, in point of law, against the defendants, at the suit of the plaintiff. 5th. That the plaintiff was not the owner of such judgment in the complaint mentioned, nor does he sue as executor, administrator or trustee of an express trust, or by authority of any statute, enabling him to sue without joining the person for whose benefit he sues. 6th. That after the accruing of the cause of action, and before commencing this action, the plaintiff issued a writ of *fi. fa.*, under the seal of the said "Circuit Superior Court of Law and Chancery, for Frederick County, in the State of Virginia," directed to the sheriff of such county, who levied under the same upon goods and chattels of the defendants, and raised money enough to satisfy the said judgment. 7th. That at the commencement of this action, there was not the sum of \$800, or any sum due to the plaintiff on such judgment.

The plaintiff, in his reply, denies the issuing of an execution; avers that he is the owner of the judgment, and says, that the whole of the amount is due and owing to him.

The plaintiff produced at the trial a judgment record of the county court of Frederick, from which it appears that the present defendants were returned in custody, and acknowledged the action against them for \$2,025 68; that the present plaintiff was plaintiff in such action; that judgment was rendered for that sum, and execution issued to recover it, of

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Mahaney a. Penman.

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which there was no return. The recovery of the judgment appears to be the 22d of April, 1850.

The defendants offered in evidence a deed of trust, dated the 6th of April, 1850, executed by all the defendants, for the benefit of all their creditors, and offered to show that the judgment was confessed after the execution of such deed and dissolution of the firm.

The judge rejected the evidence.

The defendants also offered a copy of an opinion of the presiding judge of the circuit court in the county of Frederick, wherein the present plaintiff and the present defendants were parties, in which the judgment confessed was declared void. This evidence was also rejected.

A case was made with liberty to turn the same into a bill of exceptions.

It does not appear from the case whether all the defendants were served in this action. There is only an answer of one of them (Daniel Penman) served, although the reply is to the answer of Penman and Thompson.

The cases cited in the Court of Appeals, (*Frees v. Ford*, 2 *Selden*, 176; and *Clason v. Corley*, *Selden's Notes*, 31,) if apparently inconsistent in some of the language used, are reconcilable upon the facts. The latter case came from this court, to which it was sent by the Supreme Court, and is reported in 3 *Sand.* 454. At page 456 the effect of the amendment showing the residence of the defendant, so as to exhibit jurisdiction after the original bill had been taken as confessed, is discussed by the court; and the ground there taken is affirmed in the Court of Appeals.

The possession of jurisdiction did appear on the record.

The position in *Frees v. Ford* is therefore unaffected, and the jurisdiction of this court must appear on the record. It does so appear when it appears that one of several parties jointly liable on contract has been personally served with process, or resides within the city of New York, or where all the defendants, without regard to the nature of the action, reside, or are served within the city.

Not one of these grounds of jurisdiction expressly appears on this record. Nothing tending to prove jurisdiction is shown,

unless the voluntary appearance and answer of Daniel Penman, claiming, at the same time, the benefit of the objection, is sufficient.

There are then two questions—*First*. Is such an appearance and answer an implication of his residence or of his being personally served within the city or of a consent to jurisdiction? *Next*. Is he one of several defendants jointly liable on contract?

I. In *Burckle v. Eckhardt*, 3 *Comst.*, 132, the Court of Appeals held that where a bill was filed against persons not residing within the circuit of a vice chancellor, and the residence elsewhere appeared on the face of the bill, his voluntary appearance by a solicitor did not give jurisdiction, and his allowing the bill to be taken as confessed, did not bind him. "The residence within the circuit was a jurisdictional fact which must exist before the court can act at all, either by issuing processes or accepting the appearance of a defendant. It is necessary to give jurisdiction of the cause, not of the person. In such case there can be no waiver. The want of jurisdiction appears on the record. (Per Gardiner, Justice.)

Upon this point, the case of *Bucknell v. Field* and another, 8 *Paige*, 442, deserves much attention. A judgment had been recovered by the defendants against the complainant and one Stevens, in a court in the State of Massachusetts. An action of debt on judgment was commenced in the Supreme Court of this State by the defendants against the plaintiff. The bill was to restrain the prosecution of such action upon certain alleged equitable grounds. It was filed before the vice chancellor of the first circuit, neither of the defendants residing in such circuit, but one in Westchester county and the other out of the State. The chancellor held that the subject matter having no locality, the question depended upon the fact whether the suit instituted in the Supreme Court was a cause or matter of action arising within the first circuit. If a bill could have been sustained before such suit was commenced, it was evident that the vice chancellor had no jurisdiction. He inclined to the opinion that he possessed it on the ground of such suit in the Supreme Court. (See 9 *Paige*, 151.)

The case of *Burckle v. Eckhardt* was decided in December,

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1849, and in April, 1851, the 139th section of the Code was amended by adding to it the following clause: "A voluntary appearance of a defendant is equivalent to personal service of a summons upon him."

In *Granger v. Swartz*, (11 *Legal Obs.* 346,) in this court, the learned justice says, that the voluntary appearance of defendants under this section has the same effect as a service of a summons on them upon the day of appearance would have had. The clause referred to takes away, then, the right to appear with a reservation of an objection to jurisdiction when such objection is purely personal. The defendant here cannot appear with protest, and now say that the record does not show that he was a resident or was served personally.

II. Another question then remains—Is he jointly liable with the other defendants on contract?

The case of *Bealey v. Palmer*, (1 *Hill*, 482), is referred to. Proceedings were taken by attachment under the absent debtor's act. The attachment was against the property of three persons who had been originally indebted on a joint and several promissory note, on which they had been sued in Indiana. One of them only was arrested, and judgment given against him alone. His property was attached in this state.

It was held that the remedy did not extend to attachment on a judgment in another state; the third section (1 *Rev. Stats.* 765, 2d ed.) extending only to judgments obtained here. And next that the party could not go behind the judgment and put the case under the final section which covered a debtor on contract. The judgment extinguished the simple contract debt, as to the defendant arrested.

But the arrest in that case was only of one of the parties jointly liable, and the judgment was against him alone. As to him the joint contract was gone and a separate liability was established upon the judgment. Here the original joint liability upon contract is continued in a joint liability on judgment. And I think that under a fair construction of the Code, this may be treated as still a joint liability on contract.

As to the other points raised on the bill of exceptions, I do not think a doubt can be entertained that the ruling of the judge was correct.

Motion for a new trial denied.

ST. JOHN *a.* GRIFFITH.*Supreme Court, First District; Special Term, November, 1854.*

## PLEADING.—ACT OF AGENT.

Under the Code the act of an agent should not be pleaded as the act of his principal. Of the liberality in the construction of pleadings required by the Code.

**Motion to strike out portions of a complaint.**

The complaint stated an agreement entered into by Ancel St. John, brother of the plaintiff, and claiming to act as his agent, with Griffith and Brown the defendants; by which St. John sold to defendants a lease and fixtures of a hotel, the defendants agreeing to give a chattel mortgage as collateral security for the payment of the purchase-money, part of which was to remain unpaid. It also alleged that the defendants with a view of defrauding him, had since made two notes upon which the holders had entered judgment and issued execution. It prayed a specific performance of the agreement to give a chattel mortgage and a stay of proceedings of the alleged fictitious executions issued against the defendants.

The defendant moved to strike out certain portions of the complaint; those alleging that Ancel St. John entered into the agreement of sale as agent of his brother, and also those relating to the fraud charged upon the defendants; and also that the signatures to the alleged contract be annexed to the copy given.

*Mr. Sanaway*, for the motion.

———, opposed.

ROOSEVELT, J.—This is a bill in equity to compel the specific performance of an agreement to give a chattel mortgage. The plaintiff alleges that instead of giving the mortgage as promised, the defendants Griffith and Brown had confessed a fraudulent judgment in favor of Moody and Ketchum, and that by means of an execution on the judgment, G. and B.,



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St. John a. Griffith.

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M. and K. were endeavoring to dispose of the property, and thus defeat the plaintiff's rights.

The defendants move to strike out several parts of the complaint as irrelevant and redundant.

I. It is contended first, that it is bad pleading to aver that an agent did the act instead of averring that it was done by his principal. The Code requires facts to be stated, not fiction; "the facts of the case," and not the mere legal conclusions. Such a statement therefore as that adopted by the plaintiff is not only admissible but necessary. At the same time I see no objection to the plaintiff's stating in addition to the fact what he considers to be its legal effect. Such a statement may or may not be an "unnecessary repetition" according to circumstances.

II. Next, as to the allegations of fraud. These are the necessary bases for relief against the judgment and execution devised by the defendants to defeat the creditors. The plaintiff perhaps has rung the changes on them rather too-frequently. No particular injury however, it seems to me can result from the few additional words. The complaint, as a pleading, compared with a majority of those which have come under the eye of the court, is remarkably concise. Although full, it is not overflowing—or if so at all but very slightly—not more than what the court may properly overlook. The Code indeed upon this point is imperative, making it the positive duty of the court to discard all nice objections, and to construe pleadings "liberally with a view to substantial justice between the parties."

This class of motions I may add is not to be encouraged. They involve generally a very great, and in most instances, a very fruitless consumption of time, to the prejudice of matters of substance and the delay of other suitors. Technical obstructions are not in harmony with the spirit of the age, either in the Old World or the New. Courts of justice now-a-days are expected to try cases and not pleadings. And provided the parties are reasonably notified in advance of what they are expected to meet on the trial, it is all that should be required of their adversaries, and all that is of any use in written preliminary statements. A good letter and

good answer, were there no lawyers, would be the natural, as they are, in most instances, the best forms of pleading.

The defendant's motion, except so far as it calls for the signatures of the alleged contract annexed to the complaint, must be denied.

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LEFFERTS v. SNEDIKER.

*Supreme Court: First District, General Term, Nov. 1854.*

SHAM AND FRIVOLOUS ANSWERS, DISTINGUISHED.—THE  
REMEDIES.

A *sham* answer is upon its face good, but it sets up new matter which is false.

A *frivolous* answer controverts no material allegation in the complaint, and presents no tenable defence.

The remedy for a *sham* answer, is a motion to strike it out.

The remedy for a *frivolous* one, is an application for judgment, upon *five* days notice.

Motion to strike out an answer.

This action was brought upon a promissory note. The answer denied information sufficient to form a belief whether plaintiffs were the lawful owners and holders of the note, or whether the defendant was indebted to the plaintiffs, as set forth in the complaint. The plaintiffs obtained an order to show cause, returnable in *two* days, why the answer should not be stricken out as *sham*, *frivolous* and *irrelevant*, and the plaintiffs have judgment. Upon the hearing at special term it was ordered that the answer be stricken out as "sham and frivolous." The defendant appealed.

*C. P. Kirkland*, for plaintiffs.

*J. E. Burrill, jr.*, for defendant.—The answer was not stricken out as irrelevant, but as "sham and frivolous." Now it was not sham. (*Caswell v. Bushnell*, 14 *Barb. S. C. R.* 393.) And conceding that it was frivolous, the court had no right to strike it out, but should have proceeded under § 247 of the Code, which allows a party prejudiced

by a frivolous pleading, to apply, on a notice of five days, for judgment. A defendant has the right to have his answer remain upon the record, in order to procure a review of the decision of the court. And the only mode of getting over a frivolous answer, is to apply for judgment, under § 247. (*Darrow v. Miller*, 3 *Code R.* 241 *Hill v. Smith*, 1 *Duer*, 650.)

CLERKE, J.—The Code establishes a very clear and decided distinction between sham and frivolous answers, and provides a totally different method of dealing with them. A sham answer is upon its face good, and sets up new matter, which is false; a frivolous answer controverts no material allegation in the complaint, and presents no tenable defence.

In this case the answer is not false, or, rather, it cannot be treated as false, for it sets up no new matter, and if it could be treated as false, the plaintiff could not apply for judgment, but to have it struck out, under section 152 of the Code, upon such terms as the court may deem proper. If this answer can be considered frivolous, the application should be under section 247 of the Code, on a notice of five days, for judgment. The motion was on a notice of two days to have the answer struck out, as sham, frivolous and irrelevant, and for judgment. If the notice was on five days, and if the judge decided the answer to be frivolous, he might have given judgment under section 247, disregarding the words "sham" and "irrelevant" in the notice. The order granted merely strikes out the answer as sham and frivolous, and gives no judgment. Under the notice, the application ought not to have been granted in any shape. The plaintiff's only remedy is under section 247. Order reversed.

ROOSEVELT, J., dissented.

VOORHIES *a.* BAXTER.*Supreme Court, First District ; General Term, November, 1854.*

## MISJOINDER OF DEFENDANTS.—EXECUTORS OF DECEASED PARTNER.

The executors of a deceased member of a firm cannot be sued for a debt due from the partnership, unless insolvency of the surviving partners or some other ground of special relief against them be shown.

This rule, which was formerly well settled, has not been changed by the Code.

Demurrer to complaint.

This suit was brought by William and Peter Voorhies, upon two notes made by the firm of Baxter, Brady, Lent & Co., one of whom was H. W. Childs, since deceased. The complaint joined the executors of Childs, with the surviving partners of the firm, but stated no special grounds on which relief was claimed against the executors.

The executors demurred to the complaint, on the ground that it showed no cause of action against them. The demurrer was sustained at special term, and the complaint dismissed as to the executors of Childs. From this decision the plaintiffs appealed.

*R. M. Harrington*, for plaintiff.

*W. S. Rowland*, for defendant.

MITCHELL, J.—Childs was one of a firm of six persons who made in the firm name, a note, now held by the plaintiffs ; he died, and the plaintiffs sued the five surviving partners, and with them the executors of Childs, setting forth no circumstances to raise an equity against the executors. The executors demurred, on the ground that the plaintiff showed no cause of action against them.

In *Lawrence v. The Trustees of the Leake & Watts Orphan House*, 2 Den. 577, the Court for the Correction of Errors, affirmed unanimously the decision of the chancellor and of the vice-chancellor, holding, that (although the rule may be differ-

ent in recent English cases,) here, "a creditor of a co-partnership firm, on the death of one of its members, cannot sustain a *bill* against the representatives of the deceased and the surviving members, or against such representatives alone, without averring and proving that such surviving partners are insolvent;" that "as the remedy at law survives, the creditor *is bound to resort to his legal remedy against the surviving debtors*, unless he can show a necessity for coming into a court of equity for relief against the estate of the deceased debtor:" that "such a debt is *joint*, and not joint and several." (P. 588 and '9.) The decision was not founded on the difference of jurisdiction between courts of law and courts of equity, for it denied the right to come even into equity, unless insolvency of the survivors, or some other ground of equitable relief was established; it therefore held that the creditor had no *right* of action, either at law or equity, against the executors of the deceased, until he showed insolvency in the survivors. The rule is just also; the surviving partners take all the assets of the firm, including even the share to which the deceased was entitled, and retain it and apply it to the payment of the partnership debts. They alone and not the executors of the deceased have the fund out of which the debt is primarily to be paid. The executors have only the individual property of the deceased, and that should be applied first to pay his individual debts.

In *Riart v. Townsend*, (6 *How. Pr. R.* 460,) the plaintiff made Townsend the surviving partner, and the executor of Clapp, the deceased partner, defendants; and it seems Townsend alone demurred for a misjoinder of parties. The demurrer was overruled, but with a suggestion that it would be necessary for the plaintiff to show what kind of relief he sought against the executors. The demurrer was properly overruled, for the Code, while it allows a demurrer for defect of parties, does not allow it for too many parties; and that was the meaning of the demurrer in that case. In this, the demurrer is not by the surviving partners, who have no cause of complaint, but by the executors, and on the ground that no cause of action is shown as against them. The learned judge says, in that case, that if the action is brought to enforce the liability, both of the partnership property and of the partners individu-

ally, then the surviving partners and the representatives of the deceased are necessary parties. This is so, if a case be made, giving the creditor a right as against the representatives of the deceased, and probably was intended to be confined to such cases. The Code was not intended to give a remedy under circumstances where there was no right either at law or in equity before.

The plaintiff relied on § 118 and § 122 of the Code. Section 118 is, that "any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiffs, or who is a necessary party to a complete determination or settlement of the question." This section was borrowed from the chancery practice, and was intended to preserve the right and duty of a plaintiff, to make all persons parties directly interested in the question or controversy stated in the complaint. In this case the complaint does not state any cause of action at law or in equity against the executors, but one against the other defendants only: the executors have and claim no interest in this controversy, and they are not necessary parties to a complete determination or settlement of this question. The question and the controversy only is, whether the firm made the note, not whether the estate of the deceased is to pay it. The law is, that his estate is not liable to be sued for it, if the survivors are solvent and able to pay it.

A different decision would be exceedingly prejudicial to creditors. The executors could object that no judgment should be entered against the estate until the insolvency of the firm should be ascertained, and could plead that it was solvent and be able to pay its debts, and judgment would then be delayed until that question should be settled. By leaving the law as it has already stood in this State, the creditor has first his prompt remedy on the note against the surviving partners, and then, if they are insolvent, his equitable relief against the executors.

The judgment should be affirmed with costs.

## SEABOARD AND ROANOAKE R. R. CO. a. WARD.

*Supreme Court, First District; General Term, November, 1854.*

## RIGHT TO DISCONTINUE.—COUNTER-CLAIM.

Under the former practice the plaintiff had an absolute right to discontinue on payment of costs at any time before judgment or decree, or the submission of the cause to the jury.

This right has not been abrogated by the Code.

The fact that defendant has answered, setting up a counter-claim, does not preclude the plaintiff from discontinuing before reply or demurrer or expiration of the time to reply.

Motion to set aside order of discontinuance.

The defendant having answered the complaint in this cause setting up a counter-claim, the plaintiff entered an *ex-parte* order of discontinuance; which the defendant moved at special term to set aside. The motion was denied *pro forma* for the purpose of presenting the question involved, to the general term in the first instance.

*Wm. C. Noyes*, for plaintiffs.

*P. T. Woodbury* and *C. P. Kirkland*, for defendant. The counter-claim of the defendant under the Code is in fact a cross-action by defendant against plaintiff, and possesses every feature and every right of an original action. It is pleaded exactly like matter in a complaint, and issue is joined upon it in precisely the same way. The defendant is an actor in bringing the counter-claim to trial. And if the counter-claim be in fact a cross-action, possessing every feature and every right of an original action, then the plaintiff cannot of his own motion discontinue what is in fact the defendant's suit against him. The counter-claim is analogous to the cross-bill in equity; and the dismissal of the original suit in equity never worked an abatement or dismissal as to the cross-bill. (2 *Barb. Ch. Pr.* 129. *Wickliffe v. Clay*, 1 *Dana*, 589. *S. C.* 2, *ib.* 68.)

MITCHELL, J.—The plaintiffs, a foreign corporation, commenced this action against the defendant, for moneys received as their agent. He set up a counter-claim arising out of transactions prior to the agency, and for which, if he has any claim, he can still commence an action. Before the time for replying, the plaintiffs entered an ex-parte order, dismissing the action on payment of costs. The defendant moved to vacate that order, and the judge at special term denied the motion. The defendants appeal.

The absolute right of a plaintiff to discontinue his action on payment of costs, at any time before judgment or decree, or before the case was submitted to a jury, has been the law both of this country and of England, from the earliest period to this day, unless the Code has taken away that right. It was allowed in chancery, when the cause was called on for hearing, although the defendants were ready to argue the cause on its merits, and strongly opposed the dismissal. *Curtiss v. Loyd*, 4 *Myline & K.*, 194.

Chancellor Walworth said, (*Cummins v. Bennett*, 8 *Paige*, 81,) that it is a matter of course to permit a complainant to dismiss his bill at any time before the interlocutory or final decree has been made in the cause, upon payment of costs. It was conceded by the counsel on both sides, that this right continued even if a cross-bill were filed; but that then it did not carry the cross-bill with it. But the cross-bill was the bill of the defendant; it remained in court until he voluntarily dismissed it, or it was dismissed by his default, or disposed of by the judgment of the court. It was also conceded that the right existed in replevin, where the defendant is an actor and may notice the cause as well as the plaintiff; and continued in actions of contract after the law allowed a set off to the defendant, and his right to recover from the plaintiff any excess of the set-off beyond the plaintiff's claim. In replevin the effect of the discontinuance was, a judgment for the return of the property replevied, but that was only to carry out a necessary effect of the abandonment of the suit, viz.: that property acquired by the commencement of the suit should be returned when the suit was voluntarily abandoned, and this abandonment showed that the plaintiff had no right to the property, at



least in that action; it could be obtained only by the institution of the suit, and the foundation for retaining it failed when the suit failed.

Doubt is expressed, in *Wilson v. Wheeler* (6 *How. Pr. R.* 51, 52), whether on a discontinuance by the plaintiff, in replevin, it would be part of the judgment that the goods should be returned; but it is there admitted that "the old cases under the English Statutes evidently favored a return," (p. 51), and the section of the Revised Statutes there quoted, (2 *Rev. Stats.* 530, § 53,) is broad enough to include a discontinuance whether on the motion of the plaintiff or defendant. It is:—"if the property specified in the suit have been delivered to the plaintiff, and the defendant recover judgment by discontinuance or nonsuit, such judgment shall be, that the defendant have return of the goods, &c." The defendant recovers the judgment, although the order is made on the plaintiff's motion.

The right of the plaintiff to discontinue his action having been sustained through all the changes of the law until the adoption of the Code, it must require clear and unequivocal language to take it away. It is not to be taken away by implication, unless the implication be an absolutely necessary consequence of some of the new enactments. The parts of the Code referred to, are § 274,—allowing the court to grant to the defendant any affirmative relief to which he may be entitled,—§ 256,—allowing either party after issue to give notice of trial,—§ 258,—allowing either party noticing the cause for trial to proceed with the case and take a dismissal of the complaint, or a verdict or judgment as the case may require,—§ 149,—allowing the defendant in his answer to set up any new matter constituting a defence or counter-claim,—§ 153,—allowing the plaintiff to reply to an answer setting up a counter-claim,—§ 154,—allowing the defendant when the plaintiff fails to reply or demur within the time prescribed by law, to move for such judgment as he is entitled, and if the case require it to have a writ of inquiry of damages,—and § 168,—declaring that new matter in the answer, set up as a counter-claim is to be deemed as admitted if it is not controverted.

The sections allowing a defendant after issue joined to notice the cause for trial, and after noticing it, to proceed with the

case and take such judgment as the case requires, apply to all defendants, whether they set up a counter-claim or not. Yet it is not denied that the plaintiff may discontinue except when the counter-claim is set up. Those sections do not therefore help the defendant's position; they apply, too, only after issue is joined, not to this case, when the time to reply has not yet expired. Sections 149 and 153 only allow the counter-claim to be set up as a defence and then permit the plaintiff to reply to it. They cannot effect this question. Section 154 allows the defendants, when the plaintiff fails to reply or demur to a counter-claim, to move for such judgment as he is entitled to. That does apply, and it does give a defendant an absolute right in a certain event, to have an affirmative judgment in his favor, but it is not until these events occur, that it gives any such right. It gives the right and limits it, and gives it only when the plaintiff fails to reply or demur within the time prescribed by law. Before that failure on the part of the plaintiff, he retains all the rights which he had before. After that, he loses the right to discontinue, except with the special leave of the court. If the plaintiff replies to the counter-claim, and his reply be false, or he cannot sustain it, the defendant ought not to lose any right which he would have had if the false or unsustainable reply had not been put in; and therefore in case of a counter-claim after issue joined, the defendant noticing the cause for trial should, (as section 258 and 274 allow) have his affirmative relief, and such judgment as the case may require.

The notes of the codifiers to their report of 1850, under chapter 4 of title 7, as to "the answer," (p. 267, 271) were referred to, to show that they intended that the plaintiff should not have leave to discontinue. Such no doubt was the intention of those gentlemen in certain cases, as one of them present at the argument suggested, but as he also showed they expressed that intention not in the chapter as to answers, which was adopted by the legislature, but in chapter 1 of title 8, relating to judgments in general, which chapter was adopted in part by the legislature, but with the exclusion of the section referred to. This shows first that the codifiers deemed an express provision necessary to cut off the general

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right of the plaintiff to dismiss his own action, and that they did not mean to cut it off by implication, and next that the legislature having the subject before them, did not choose to alter the old law. In the chapter last referred to, § 748 corresponds with § 245 of the Code, sections 749 and 750 with 274 of the Code, and section 751 with section 275 of the Code. Then follows section 752, which was not adopted and which proposed to abolish all other modes of dismissing an action, except those therein specified; one of them was "by the plaintiff himself at any time before trial, if a provisional remedy has not been allowed, or counter-claim made."

It would seem to be clear that the legislature did not intend to abolish this ancient and firmly established right of a plaintiff, merely because a counter-claim was made, and that the codifiers did not mean so, unless their express provision for that purpose should be adopted. By clear implication they have abolished it when the plaintiff fails to reply or demur to the counter-claim, or to appear at the trial, but then only."

Whether under the general power of the court to control its process and the orders made by it or in its name, it may not when the defendant will otherwise lose his redress, vacate an order of dismissal entered by the plaintiff, need not be examined. This case presents no such circumstances.

The case of *Cockle against Underwood*,\* decided by Judge Bosworth in the Superior Court, has been submitted to us since the argument of this cause. In that case the plaintiff had failed to reply to the counter-claim, within the time prescribed by law, and then we agree that the plaintiff cannot dismiss his complaint without special leave.

The order appealed from is affirmed, with costs.

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\* Ante p. 1.

## WEED a. PENDLETON.

*Supreme Court, First District ; General Term, November, 1854.*JUDGMENT RECORD.—REGULARITY.—ESTOPPEL OF JUDGMENT  
DEBTOR.

Where a second record of judgment in the course of a suit was, by mistake, made up and filed, and execution issued thereupon, in good faith, upon the supposition that the second entry of judgment was in fact for another demand, and the defendant contrived to procure satisfaction of the first entered judgment, and then moved to vacate the second for irregularity :

*Held*, that he was, under the circumstances, estopped, by procuring the first judgment to be satisfied, from objecting to the regularity of the second.

## Motion to vacate the record of a judgment.

Pendleton, the judgment debtor, brought an action in the Superior Court, to recover damages for the taking of his property upon execution, issued under the judgment now sought to be set aside, which was a judgment entered in the Supreme Court, but the Superior Court held the record conclusive to justify the taking. He then moved this court at special term, upon grounds which appear in the opinion, to vacate the judgment and take the record from the files, in order that he might recover for the property taken upon the execution. The motion was denied, and he appealed.

*A. Matthews*, for the motion.

*D. D. Field*, in opposition.

MITCHELL, J.—Pendleton endorsed to C. W. Weed three notes, each dated February, 1837 ; one at twelve months, for \$4,308 97, another at fifteen months, for the same sum, and the third at eighteen months, for \$2,154 48. On the first note judgment was obtained on 8th of May, 1838, for \$4,450 12. On the second note an action was commenced 31st May, 1838, and judgment was entered on it 2d July, 1838, for \$4,450 25. No action was ever brought on the third note for \$2,154 48.

The attorneys for the plaintiffs are dead, but it appears from

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their register, that they entered in it the commencement of the suit on the second note, and all the proceedings to the assessment of damages and taxation of costs, but did not enter the fact of filing the judgment record; and that nearly a year after that, in June, 1839, a clerk of theirs filed a record on the last mentioned day, and made an entry of doing so. Thus the plaintiffs had three notes endorsed by the defendant, and three judgment records—one on the first note, another on the second note, and a third, in reality, on the second note, but which, after a lapse of time, they might naturally suppose, if they did not recollect the amount of the notes, was for the third note. On the 15th June, 1839, execution was issued on this third judgment record and returned wholly unsatisfied. Nothing was done on either judgment, until 16th February, 1849, nearly ten years afterwards, an *alias fi. fa.* was issued on this last judgment, and Pendleton's property was taken under it. He has since commenced an action of trespass for this taking, and as the judgment record cannot be impeached in that action, he moved this court to vacate the entry of the third judgment.

This is a motion addressed to the equity of the court; it is necessary, therefore, to see whether equity requires that this motion should be granted.

After the levy, Pendleton discovered that the third judgment, as well as the second, was on the second note, and was advised that the third was a nullity. He called on Charles W. Weed, who was attorney for the plaintiffs, in the summer or fall of 1849, and concealing the fact that he and his counsel thought the third judgment void, and the execution under it irregular, and that he had discovered that the third judgment was not on the third note, but on the second,—he commenced the conversation, as he shows, by remarks, which must have led Weed to understand that all three of the judgments were in full force, and that the execution on the third was regular; for instead of intimating that the execution was irregular, he spoke of it as unjust to him, because it was issued for old and extinguished claims, and during his absence from the city, and in violation of an understanding before hand that he should not be molested in respect to the same; and that he

must have a statement of the disposition that had been made of the collateral paper which had been placed in the hands of the plaintiffs, which collateral was to the whole debt. He thus suppressed facts, the knowledge of which he knew would have prevented Weed from doing what Weed afterwards offered to do, and also by the statements made by him led Weed to believe that the third judgment, and the execution on it, were valid. If they were not valid, there was no need of Pendleton's having an account of the collateral paper, and they could not much molest him; a motion to set them aside was all that he needed. Under the impression thus produced by Pendleton, Weed promised to procure, and did procure an assignment to a friend of Pendleton's, of the two first judgments. Pendleton having got them, a few days afterwards also asked for and obtained satisfaction pieces for those two judgments, and filed them. And "*from that time,*" he says, "his counsel made various endeavors to procure satisfactory compensation to deponent for his property, which had been taken and sacrificed to the extent of about \$20,000, by the sheriff's sale, under said *alias* execution."

This seems as if he would say, that having thus procured a satisfaction to be entered of the first two judgments without payment, he from that time endeavored to defeat the third which he had led Weed to believe was valid and in force. When Pendleton came and complained of the levy on his goods, his complaint must have been of the levy under the execution on the third judgment, for no other was issued. Weed then stated to him that he could not satisfy the third, for it was assigned as security to his attorneys, but offered to assign the first and second, with the understanding, at least on his part, that he would retain the third and the execution on it. When Weed thus distinctly stated his views, Pendleton was bound to decline the offer, or to accept it with the condition which he knew Weed meant to attach to it, or disabuse Weed from the false impression on his mind, produced in part by Pendleton's aid. Pendleton, by the acceptance of the two assignments under the circumstances, and the concealment which he practiced, has estopped himself from setting up the invalidity of the third judgment, at least on a motion where

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he seeks affirmative relief, which the court is to grant only if equity require it.

The defendant's counsel argued as if the third judgment were so irregular, that it was a matter of course, to set it aside. It is not so. That judgment-record was founded on the second note, and on the declaration actually served on it. So also was the second judgment-record. If the defendant had moved to have one of the two records cancelled, and it had been shown that he had done any act, in consequence of which, it might be difficult to sustain the second judgment,—the court would have sustained the third and cancelled the second. So here, the defendant having procured a satisfaction of the second, without consideration, or by causing the belief that the third was valid, the court should now sustain the third, as the true record under that note. Or, if the second were not satisfied, the court might have awarded the *fi. fa.* and *alias fi. fa.* so as to apply them to the second judgment. But that cannot now be done, in consequence of the defendant's procuring a satisfaction of that judgment. The act of the defendant in seeking a satisfaction of that judgment, after he had obtained an assignment of it to his friend, looks as if he had laid his plan thus to defeat the power of the equitable interposition of the court. It may be that no unjust motives entered the defendant's mind until he was pursued by proceedings supplementary to the execution, and that until then he intended to let the execution remain,—and this was intimated by his counsel. If so, then both parties meant the third judgment and the execution, to stand as part of the arrangement under which the first and second judgments should be satisfied; and then there was originally a good intent, but there would be a fraud in departing from that mutual intent.

It was argued that the whole debt was paid in fact. The affidavits on that question are not very satisfactory, and the defendant, if he wishes to, may have a reference to ascertain that fact.

The order appealed from is affirmed, with costs.

MARKOE *a.* ALDRICH.

*Supreme Court: First District; General Term, Nov., 1847.*

TESTIMONY TAKEN CONDITIONALLY.—PROOF OF FOREIGN  
RECORDS.—AMENDMENT AFTER VERDICT.

Testimony taken conditionally, is admissible upon the trial, notwithstanding that one of the original plaintiffs has died, and the suit is continued (under § 121 of the Code,) by the survivor.

It is also admissible notwithstanding the witness may have returned to the State since his examination, if he is not within the State at the time of the trial.

The proper methods of proving public records of other States defined.

When a record improperly attested had been admitted upon the trial, and the proper certificates were produced and filed upon the motion for a new trial—Held, that a new trial would not be granted.

Motion for a new trial.

This action was commenced in 1848, by Braxton and Markoe, against Aldrich. Braxton having died in 1850, the cause was continued by Markoe, pursuant to § 121 of the Code, by a supplemental complaint, filed in December, 1851.

Upon the trial before Mitchell, J., 24 Nov. 1852, the plaintiff, after having proved the absence of one Harvey Mills from the State, offered in evidence his deposition, taken conditionally, (pursuant to *Rev. Stats., art. 1, title 3, ch. 7, Pt. III.*) in April, 1851, after the death of Braxton, but before the filing of Markoe's supplemental complaint.

The defendant's counsel objected to the admission of the deposition upon the ground that at the time it was taken, the cause of Braxton and Markoe *a.* Aldrich, in which the deposition was entitled, was not pending. Also upon the ground that it appeared from the testimony offered by plaintiff relative to the absence of Mills, that he had returned to the city of New-York after his conditional examination, although he did not remain until the trial.

The evidence was admitted and defendant excepted.

The plaintiff then offered in evidence a copy of a mortgage, purporting to have been acknowledged and recorded in Cass



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County, Indiana. It was accompanied by a certificate, with seal annexed, of one Douglass, as Recorder of Cass county, that the copy was a true copy of records in his office,—by a certificate of one Duret, as clerk of the Cass Circuit Court, with seal of that court annexed, that Douglass was at the date of his certificate, the recorder of the county, and that this signature to the certificate was genuine,—and by the further certificate of Horace P. Biddle, as president judge of the Southern Judicial District, and of the Cass Circuit Court, that Duret was at the date of his certificate, clerk of the Cass Circuit Court, and that Duret's certificate was in due form.

The defendant objected to this evidence on the ground that the certificates did not constitute the proper authentication of a mortgage to allow it to be read in evidence. But the judge overruled the objection, and admitted the evidence, and defendant excepted.

The jury found a verdict for the plaintiff, and defendant moved to set aside the verdict and for a new trial.

*E. D. Lawton*, for plaintiff.

*C. P. Kirkland*, for defendant.

CLERKE, J.—I. The proposition of defendant's counsel that the testimony was taken in a suit not pending, is entirely inconsistent with the provisions of the Revised Statutes, and the Code declaring that no action shall abate by the death, &c. of a party, (2 *Rev. Stats.* 387, § 4, *Code* § 121). If it did not abate notwithstanding the death of Braxton, one of the plaintiffs, it was still pending, when the testimony of Mills was taken conditionally; it was taken in this suit, which according to the Code and the Revised Statutes, has been continued and not originated anew, after the death of Braxton.

II. The defendant's counsel objected to this testimony also, on the ground that having been taken in April, 1851, the witness had not continued absent from the State, but had returned and remained until about two weeks previous to the trial. He maintains it must be an uninterrupted absence from the time of taking the testimony until the beginning of the trial. I think this would be a construction of the statute cal-

culated to defeat its design, and to make the admissibility of the testimony dependent upon the movements of a person over whom the party requiring the testimony can have no control. He may go and come, but if it is shewn he is not here at the time of trial, the end of the statute is answered. It could never have been intended that every time the witness takes a new departure from the State, a new order is to be granted, and a repetition of the same examination is to be made. This would be multiplying work without an adequate object. The salutary usage of the common law, requiring in all practicable cases the presence of the witness at the trial, is sufficiently favored and conserved by excluding testimony taken conditionally, when it is not shewn that the witness is absent at the time of the trial.

III. The objection that the mortgage was not properly authenticated, seems to be more tenable. It was recorded in Cass County, State of Indiana, in the office of the recorder of that county, a public office established in every county of that state, similar to that of register of the city and county of New York. The certificate of this officer was produced with that of the clerk of Cass Circuit Court, attesting that he was recorder, and that his signature was genuine with the seal of the court annexed, together with the certificate of the presiding judge of that court attesting the clerk's certificate.

By the act of Congress of 1790, it is provided that the records and judicial proceedings *of the courts of any State* shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate as the case may be, that the said attestation is in due form. The recording of the mortgage in this case seems to have been authenticated under this act; which applies only to records and judicial proceedings in *courts*.

By the act of March 27, 1804, § 1, however it is provided "that all records and exemplifications of office books which may be kept in any public office of any State, *not appertaining to a court*, shall be proved or admitted into any other court or office in any other State by the attestation of the

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keeper of such records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding judge of the court of the county or district, as the case may be in which such office is or may be kept, &c., or of the governor, &c., that such attestation is in due form, and by the proper officer, and such certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk of the court, who shall certify under his hand and seal of office, that the presiding justice is duly commissioned and qualified." So that the certificates of the judge and clerk are in this case reversed both in their contents and in the order in which they are presented. The judge should have certified to the genuineness and authenticity of the recorder's certificate and the clerk to that of the judge.

IV. But this is an error for which the court will not grant a new trial if it can be rectified; and the case is now amended by consent, the proper certificates being produced and filed.

Judgment affirmed with costs.

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PRINGLE v. CHAMBERS.

*Supreme Court, First District; General Term, November, 1854.*

ALTERATIONS IN AGREEMENT.—BURDEN OF PROOF.

It is a question of fact which should be submitted to the jury, whether material alterations appearing upon the face of an instrument containing an agreement *inter partes*, were made before or after its execution.

An admission by one of two plaintiffs, embodied in his agreement with a third party, to the effect that the note now in suit was void,—*held* admissible in favor of the present defendant.

Appeal from judgment upon a verdict.

The plaintiffs, against whom judgment was rendered at circuit, appealed upon exceptions to the rulings of the court, allowing two written agreements, in one of which there was a material alteration, and the other of which was made between one of the plaintiffs and a third person, to be given in evidence by the defendant. There were also other exceptions

raising no important points of practice. The facts involved, sufficiently appear, in the opinion of the court.

*J. E. Burrill, jr.*, for plaintiff. I. The alteration in the agreement No. 1, was material, and beneficial to the defendant. The defendant was bound in some manner to explain or account for the alteration, and in the absence of such explanation, the evidence should have been rejected. *Acker v. Ledyard*, 8 *Barb.* 516; *Tillou v. The Clinton and Essex Insurance Company*, 7 *Barb.* 568; *Jackson v. Osborn*, 2 *Wend.*, 555; *Waring v. Smyth*, 2 *Barb. Ch. R.*, 123 n. *Herrick v. Malen*, 22 *Wend.*, 388; *Knight v. Clements*, 8 *Ad. & E.*, 215; *Henman v. Dickinson*, 5 *Bing.* 183; *Jackson v. Jacobi*, 9 *Cow.* 128; *Cooper v. Becket*, 4 *Moore, P. P. C.* 419; *Van Buren v. Cockburn*, 14, *Barb.* 122.

II. The court erred in admitting the agreement of Jacob Pringle, No. 4, because there was no proof that it was entered into by J. L. Chambers, for the benefit of the defendant, and it could not inure to the benefit of defendant to defeat this action, and because there was no proof of any authority to Jacob Pringle to bind John P. Pringle under seal.

*Loomis, Thayer & Smith*, attorneys for defendant.—I. No proof was offered showing when the alteration was made; and if the court was allowed in the absence of proof to indulge in any presumption as to the time of the alteration, the rule which requires all presumptions to be in favor of innocence and validity, required the court to declare that the alteration was antecedent to, or contemporaneous with the execution. (1 *Greenl. Ev.* 678, § 564; *U. S. v. Spalding*, 2 *Mason*, 478; *Jackson v. Osborn*, 2 *Wend.* 556; *Jackson v. Malin* 15, *Johns.* 296.

II. The agreement of Jacob Pringle was admissible, if not as an agreement, certainly as an *admission* that the notes were null and void.

CLERKE, J.—This was an action on an agreement given by defendant, on the assignment of a purchase of a patent right, promising to pay five hundred dollars in nine months, and one thousand dollars in twelve months, after date; payment being contingent on his continuing to manufacture and vend the machine to which the patent right related.

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By an agreement of the same date, signed by all the parties, it was provided that if the defendant should find the business of manufacturing, vending and selling this machine unprofitable, he might duly notify the plaintiffs in writing, either in person or by a written notice, directed and duly mailed to Sumner Hill Post-Office, Pa., stating that he intended to cancel and surrender and give over the articles thereto annexed; upon which the same should be null and void, provided the notice should be given within nine months.

This action is for the first amount of \$500, giving credit for \$5 to defendant; the demand of judgment being \$495, with interest from August 1, 1850.

The defendant proved a notice mailed and deposited in the Post-Office on the 6th of April, 1850, directed to the plaintiffs, at Sumner Hill Post-Office, Pa., notifying the plaintiffs, in compliance with the agreement, that the manufacturing of the machine was unprofitable, and that he ceased to manufacture and vend it; requesting the plaintiffs to annul the articles of agreement.

In support further of the defence, an agreement relating also to the matters, dated 1st of August, 1850, and marked Exhibit No. 1, was introduced, signed by Jacob Pringle, at the end of which, and after the words "in witness whereof I hereunto set my hand and seal," were added the words "*and I further agree to return the obligation of said Chambers, dated Oct. 30, '49, at 9 and 12 mos., for \$1,500; all of which is null and void.*"

Another paper was also introduced by defendant, dated July 5, 1850, and marked Exhibit No. 4, signed Jacob Pringle, acknowledging the receipt of thirty-seven dollars from J. L. Chambers, (not the defendant), which sum Pringle binds himself to use in and for the construction of this machine, to be completed before the 20th July, and to refund thirty-five dollars to said Chambers, in case he should refuse to receive the machine; and then adding, beginning the word *also* with a small letter: "also, I obligate myself to refund and return Mr. Chambers' (the defendant,) notes dated 30th October, 1849, one at 9 months for \$500, and one at 12 months, for \$1,000, being null and void.

The last two papers were introduced in confirmation of

the sufficiency of the notice, and to show that Jacob Pringle considered the agreement or note on which this action was brought, to have been cancelled by the notice, pursuant to the terms of the first agreement.

I. The plaintiff's counsel objected to the introduction of the paper, on the ground that it was apparent on the face of the paper that it had been altered since it was executed and delivered. The judge at the trial overruled the objection, leaving the question to the jury as to the time when the alteration was made.

The counsel, certainly, demanded more by this objection than I have noticed in any books of modern authority, with the exception of the legal novel called *Ten Thousand a Year*, written by Mr. Warren, in which Lord Widdrington, in the fictitious case of "Doe on the Demise of Titmouse against Jolter," is described as refusing to receive a deed in evidence, because it had an erasure in a material part of it; and so the real defendant, Aubrey, lost ten thousand a year, and his position in society.

By this objection the counsel did not, either in the case of Doe *v.* Jolter, or of Pringle *v.* Chambers, ask the court to charge the jury that the defendant was bound in some manner to explain or account for the alteration, but that the question should not go to the jury at all. Where there are erasures or interlineations, or very material alterations appearing on the face of an instrument, it becomes a question of fact for the jury whether they were made before or after execution; and, as Mr. Evans, in his edition of Pothier, says:—"The decision of that question will in a great measure depend upon the circumstances of each individual case," and it is a salutary rule which I think our courts generally are disposed to adopt, though as yet not with perfect unanimity, that where the alteration appears to be suspicious on its face, and is not duly noted, the *onus* lies with the party who claims that the alteration was genuine. But nothing of this kind was required by the plaintiff's counsel. Both in his objection to the admissibility of the instrument, in the first instance, and his request how the judge should charge the jury, he insisted that the sufficiency as well as the admissibility of the instrument were

exclusively for the court. The judge left it with the jury to say when the alteration was made, and stated to them, if it was made after the delivery, it could have no effect. This ruling was perfectly correct, although it is not precisely in keeping with the decision of Lord Widdrington on the important occasion to which I have referred, in a case described by one who is not only celebrated as a writer of many interesting fictions, but also as the author of some useful elementary legal works.

II. Was the defendant obliged to show that the business of manufacturing and vending the machine was unprofitable in fact;—did the *onus* to do so lay upon him, so that he must show it before he could claim the benefit of that part of the agreement providing for giving the notice and rescinding the contract?

The court charged the jury that if the written notice was sent as testified by the witness, that annulled the contract as to the defendant. In the absence of any proof on the part of the plaintiffs showing that the business was profitable, this was correct. The agreement left it to the defendant to determine whether the manufacture was profitable or not; and this was safe for all parties, for it may be taken for granted that the defendant would not relinquish the right if he found it profitable. The plaintiffs might have been permitted to show that the statement in the notice was untrue, but he gave no evidence on the subject, and the jury have nothing to do but to decide upon the sufficiency of the notice itself, corroborated by exhibits No. 1 and No. 4, both of which, as I have already intimated, were introduced for this purpose. They were introduced rather as admissions than as agreements. The paper (Exhibit No. 4), dated July 5, 1850, is a paper with which the defendant has directly nothing to do. It certainly does not amount to an agreement between him and Jacob Pringle; but that is no reason why a certain statement in it is not effectual as an admission against Pringle, made against his own interest, used as evidence in favor of the defendant.

If the evidence offered by the plaintiff had been admitted by the court, it might have shown that the defendant manufactured the machine after he sent the notice cancelling the agreement, but this could have no effect in determining whether

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the agreement was actually cancelled or not. It could have no tendency to show whether the manufacture was profitable or unprofitable at the time the notice was sent. Neither could it have shown a waiver; there could have been no waiver in the proper sense of the term after the notice and the acquiescence of the plaintiff as proved; there could only be a renewal of the agreement; and if this restored the parties to their original rights and liabilities, it should have been proved. No offer was made to prove anything of the kind, and the court properly refused to receive the testimony.

The judgment should be affirmed with costs.

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MARKS *a.* BARD.

*Supreme Court, First District; General Term, November, 1854.*

## JOINDER OF PARTIES.—COSTS.—FORM OF JUDGMENT.

It appearing upon the trial of an action brought against seven defendants, that five of them only were liable, the plaintiff moved to strike out the names of the other two. Motion granted with the addition that he pay their costs; and judgment rendered in favor of the two for their costs, and against the five for debt and costs. The allowance of costs to the two defendants severed, sustained on appeal.

The proper form of judgment in such a case

Appeal from an order.

The facts in this case sufficiently appear in the opinion of the court.

*A. R. Dyett*, for plaintiff.

*Messrs. Holden and Thayer*, for defendants.

MITCHELL, J.—The plaintiff sued E. H. Bard, and J. Bard, jr., with five other defendants, as joint makers of a promissory note. These two defendants, with four of the other defendants, put in an answer in which all six denied that the defendants made the note in question, or that the defendants were partners; and these two defendants also denied all facts stated in the complaint. At the trial the plaintiff moved to



strike out the names of these two defendants from the complaint, and to dismiss the action as to them, and his motion was granted with the addition that he pay one bill of costs to these two defendants. From the latter part of this order the plaintiff appeals.

It was a matter of course if his motion was granted, that the plaintiff should pay the costs of the judgment to be entered against him in favor of these two defendants. He himself asked to discontinue the action as to them: he thus asked to separate them from the other defendants, and became subject to the costs that would follow from that separation. If their joining with the other defendants in making a defence would ordinarily have compelled them to share the fate of those defendants, the plaintiff's own motion released them from that position. His complaint was joint as to all, and the answer followed it and was joint. His motion severed these defendants, so that his complaint was no longer to be deemed as joining them with the other defendants, and it must (to do justice) be deemed also to have severed the answers of these defendants also. If this were not so, still the permission to discontinue as to the two defendants, was in the discretion of the court, and was evidently granted only on condition that they be paid their costs. If the plaintiff had not accepted this condition, he would have been non-suited for suing as partners those who were not partners.

Judgment should be affirmed with costs.

CLERKE, J., concurred.

ROOSEVELT, J.—Technically the judgment should have been, a dismissal of the complaint with costs; with leave reserved to plaintiff to amend by striking out the two superfluous defendants on payment of their costs; and in that case judgment to be rendered against the other defendants with costs. Then, in either event the plaintiff must have paid the costs of those two defendants. Under the present judgment he does no more. The plaintiff moved. He has no substantial ground of complaint, and not being injured, he cannot appeal.

## LANE v. BEAM.

*Supreme Court, First District; General Term, November, 1854.*

## AMENDMENT.—CHANGING NATURE OF ACTION.

Plaintiff purposely commenced his action upon contract, with a view to obtain an order for publication and warrant of attachment. Having obtained this, he applied for leave to amend the summons and complaint, so as to found the action, not upon contract, but upon tort.

Held, that the application was properly denied, at special term.

## Motion for leave to amend summons and complaint.

The plaintiff commenced an action upon contract for goods sold, and after obtaining an attachment and order for publication, applied for leave to amend his summons and complaint, so as to make the action "substantially the common law action of trover and conversion" of the goods.

*D. Evans*, for plaintiff.

*W. S. Rowland*, for defendant.

MITCHELL, J.—As this case was stated by the counsel for the plaintiff, and as may be conjectured from the affidavits, the plaintiff commenced his action as in contract, purposely and deliberately, that he might be sure not only of an attachment against the defendant as a non-resident, but also of being able to procure an order for publication against him, which he could not obtain if he proceeded for a tort. Having by this means procured the appearance of the defendant, he moved at special term to change his summons and complaint, so that they should not be on contract, but on tort, for converting the plaintiff's goods.

The 173d section of the Code allows an amendment, by correcting a mistake in the name of a party, or a mistake in any other respect. But then there was no mistake—there was a

deliberate purpose in making the statement of the action as it is. That section, therefore, does not aid the plaintiff.

The power of the court to amend proceedings before it, is a result of the control which it has over its process and pleadings, and is not conferred by the Code. The legislature has steadily shown its desire that this power should be liberally exercised, and has never (it is believed) curtailed it. The court are disposed to conform to this exhibition of legislative will, and to allow any amendment that justice may require.

Does justice call for this amendment? The plaintiff has played his game with an object in view, and succeeded in that, and he should not be allowed now to seek another advantage inconsistent with his first successful scheme. The rights of the defendant, and of the sureties, who entered into bonds on the discharge of the attachment, would be materially changed by the proposed alteration. In this action on contract, no more could be recovered than the price for which the goods were sold—in the action for the conversion, the value of the goods and damages for the conversion, might be recovered, the last being somewhat in the discretion of the jury, and the whole might exceed the price of the sale. It was said, that under the old system, the court allowed an *ac etiam* in a *capias* to be changed from *covenant* to *assumpsit*, and said the bail had no right to object to the amendment. (*Blue v. Stout*, 3 Cow. 354.) The damages to be recovered, would be the same, whether the action were *covenant* or *assumpsit*, and so the bail would not be damaged by the change; and the bail have no right to object to an amendment in the original suit, their time to object is when they are sued. Under the circumstances, there is no ground for disturbing the decision at special term, refusing to allow the amendment.

Order affirmed, with costs.

LEROY *a.* LOWBER.*Supreme Court, First District ; General Term, November, 1854.*

## REFORMATION OF AGREEMENT—PROPER RELIEF.

Upon a dissolution of partnership Lowber offered that Le Roy should take all the assets, excepting certain machinery, upon conditions, that he would pay all the debts of the firm, and that whatever amount should be realized above \$20,000 should belong to Lowber ; also promising to furnish a list of assets. This offer was accepted. Lowber subsequently delivered to Le Roy the promised list of assets, in which the condition of the partnership affairs being more unfavorable than he had supposed, he voluntarily included the machinery excepted in his original proposition.

Held, at special term, upon application as to a court of equity to reform the agreement, so that it should vest the machinery in Le Roy, that his proper remedy lay in treating the transactions subsequent to his acceptance of Lowber's offer as a new and distinct agreement substituted for and superseding the original one.

Held, by the general term, overruling this decision, that the proper relief was a decree that the exception in the original agreement reserving the machinery to Lowber was founded in mistake, and should be stricken out ; and that the agreement should be reformed accordingly.

## Appeal from a dismissal of complaint.

This action was brought to have a certain agreement of dissolution of partnership between the plaintiff and the defendant, construed as if a certain list of assets were a part of it, or so reformed as to carry into effect the alleged intention of the parties to have the list of assets so considered ; also to have the defendant enjoined from enforcing a certain judgment recovered by him at law in the New York Superior Court against the plaintiff.

The principal facts upon which the application for this equitable relief was granted were as follows :

In July, 1845, Lowber was manufacturing and dealing in lead pipe, and entered into partnership with Jacob Le Roy and his son, Thomas Otis Le Roy, for the continuance of that business.

Jacob Le Roy was special partner, and contributed \$25,000 in cash.

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Le Roy *a.* Lowber.

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Lowber was a general partner, and contributed \$23,032 50, of which about \$1200 was in cash, and the balance in notes, accounts, stocks, and certain machinery and fixtures. He also immediately drew out from the partnership funds above \$8,000.

In March or April, 1846, Lowber informed Jacob Le Roy that the partnership had become embarrassed, and solicited a further advance. Le Roy then made an examination into the accounts, for the first time, as appeared, expressed himself dissatisfied with the management of affairs, refused to go on, and demanded a dissolution.

Lowber then offered to pay the elder Le Roy \$20,000 for his interest in the firm, and to secure the debts of the firm. This offer Le Roy accepted. But Lowber not having means to perform it, sent to him a letter dated April 4, 1846, proposing a dissolution upon terms, in substance, that Le Roy should take all the assets of the firm, *not appertaining to the machinery*, and pay the debts of the firm, among which were several claims upon the mill and engine used in the manufacturing; and that defendant should take all machinery and appurtenances then on hand, the arrangement to go into effect Monday, April 6; stipulating in a postscript that all amounts over and above \$20,000 which might be realized by Le Roy should be paid over to Lowber. By the messenger who conveyed this letter to Le Roy, Lowber also sent a verbal message promising to furnish him with a schedule of assets which were to come to Le Roy under the proposed arrangement.

Le Roy accepted this proposal.

Upon the 5th of April, which was Sunday, Lowber, in company with his brother, E. J. Lowber, and Smith, an employee of the firm, proceeded to make out a list of assets to go to plaintiff. It then appeared that so far from realizing twenty thousand dollars, it was not probable that Le Roy could realize more than six or eight thousand, taking both debts and assets to be good; provided the mill and engine employed in the manufacture should be reserved to Lowber as proposed by him. It was then determined upon, as the balance of evidence showed, with Lowber's consent, that the mill and engine should be added to the assets to be transferred to Le Roy. They were accordingly included in the list of assets, which was

subsequently delivered to Le Roy ; and on Monday, April 6, Le Roy was placed in possession of the assets, the mill and engine being included.

Thomas O. Le Roy and Smith then formed a partnership to continue the business, taking Lowber into their employ to manufacture for them. Their agreement with him treated the mill and engine as belonging to Lowber ; but they undertook to pay off the claims upon the machinery which had been assumed by Jacob Le Roy, they to be secured for their advances by a mortgage upon the machinery. They paid off the claims ; and Lowber not being able to repay them, they took the mill and engine. So that the claims were not paid by Jacob Le Roy directly, but out of the machinery.

Lowber then sued Le Roy in the New York Superior Court for breach of his agreement of 4th April, to pay those claims. Le Roy offered the list of assets furnished to him by Lowber, in evidence to explain the agreement, and show that the machinery reserved to Lowber was not intended to include the mill and engine. But the court rejected the evidence, as no part of the agreement, and incompetent to vary or explain it, and rendered judgment for the then plaintiff, Lowber.

Le Roy now commenced this action in the Supreme Court, praying a reformation of the agreement, and injunction against any steps to enforce the judgment of the Superior Court. A temporary injunction was granted, and testimony taken before Lucius Robinson, referee, and the cause was tried before Mitchell, J., at special term, in September, 1852.

An opinion was rendered by Mr. Justice Mitchell, in which, after reviewing the evidence at length, he arrived at the following conclusions :

That it was the original agreement that plaintiff should pay the debts of the firm, including the claims upon the machinery referred to, and that defendant should take the mill and engine.

That the subsequent transactions showed that it was afterwards independently agreed that plaintiff should have the mill and engine also ; that he transferred them to the firm of Le Roy & Smith ; that they sold them to defendant, he assuming to pay the claims to which the machinery was still subject ; that, as he had not means to do so, they advanced the funds,

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Le Roy *v.* Lowber.

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taking the mortgage under which they subsequently took the property.

That the list of assets and the transactions connected therewith should have been offered before the Superior Court as evidence of a new agreement, substituted for that originally made, and not by way of explanation of the original one.

That the plaintiff's proper remedy was, by motion for a new trial before the Superior Court.

That plaintiff was not entitled to have the agreement of the fourth of April reformed as desired, because it was not the real intent of that agreement that the mill and engine should be transferred to him.

That the complaint must be dismissed and the injunction dissolved.

From this decision the plaintiffs appealed to the general term.

*Hiram Ketchum* and *C. Tracy*, for plaintiff.

*C. O'Connor*, for defendant.

ROOSEVELT, J.—The leading object of this suit is, to correct an alleged mistake in a certain agreement between Lowber and Le Roy, set forth in the complaint. Lowber, it seems, before the new Code, sued Le Roy for an alleged breach of the agreement, in the Superior Court, and the latter sought in that court and under the old system of practice, to reform the agreement by way of defence, which, as the law then stood, not being allowed, he now files an affirmative bill in equity for the same purpose, praying also for a temporary, to be followed in the end by a perpetual injunction to stay all further proceedings at law in the action in the Superior Court. The controversy arises out of the dissolution of partnership; Lowber claiming that Le Roy, by the agreement, was to have paid certain debts; that he left them unpaid; and that he, Lowber, was made to pay them, and is entitled, as a consequence, to be reimbursed. Whereas Le Roy insists that the property which went to make the payment, although Lowber's by the original letter of their agreement, was his, Le Roy's, by justice of the case, and by the true ultimate understanding of the parties.

The articles of dissolution are in the form of letters: one

from Lowber, containing his proposition to Le Roy; and the other from Le Roy, containing his answer to Lowber, and both dated the 4th April (Saturday), 1846.

Without reciting all the terms of settlement, it is sufficient to say, that under any interpretation, they were grossly unjust to Le Roy, and (himself being judge) exceedingly liberal to Lowber. Le Roy, who had put in most and taken out nothing, was in general to assume the debts, taking the assets except such as appertained to the machinery, while Lowber, who had put in least (and that in sundries instead of cash,) and already drawn nearly as much as he had advanced, was not only to be discharged from general liability, but to keep the machinery and its appurtenances for himself. "This arrangement," using the language of Lowber's letter, "to take effect on Monday the 6th instant, when all books and assets, will be given into your (Le Roy's) hands." Le Roy, it should be remembered, was not a general partner, but had put in the specific sum of \$25,000. The concern had *been in operation* about nine months, and Lowber, as he said, "deeply, most deeply regretted, that they should have made such losses in so early a stage of the partnership." He nevertheless, from motives which he, of course is estopped from saying were not *bona fide*, on the same day, and to the same letter which contained his proposal, appended a postscript apprizing Le Roy, that "the arrangement was upon the express condition that all amounts over and above seventy thousand dollars, which might be realized out of the assets, &c., were to be paid to him, Lowber." This certainly was a pretty strong intimation, and coming from a general to a special partner, almost a guaranteed assurance, that while he, Lowber, was to lose nothing, the loss of his associate under the present arrangement, would and should be limited to five thousand dollars. Even under this assumption, it was a hard bargain, and one which Lowber had no right to impose upon his good-natured friend. Indeed, he appears to have soon become sensible of this himself, for on the very same day he writes another letter to Le Roy, in which he marks out for himself in the future, a course of labor and self-denial: "until I have made up (as he says) my share of the losses of Lowber and Le Roy, so as to



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make good the twenty-five thousand dollars invested by yourself."

The arrangement thus explained by Lowber, although instituted on Saturday the 4th, was not to "take effect," it will be recollected, until Monday the 6th. It was inchoate, and so expressly agreed to be, during the interval of the Sabbath. That interval, it appears, the conscience of some of the parties not being perfectly at ease, was devoted, and in this view very properly devoted to self-examination; which resulted in the discovery that a great mistake, and perhaps a great wrong, had been committed, and in a declaration by Lowber, that before the arrangement took effect, it should be rectified and redressed.

The mistake was one of fact. The assets, instead of being as he, Lowber, had given Le Roy to understand, "*over and above twenty thousand dollars*," without the machinery, were found, after exhausting a large portion of the Sabbath in their detailed investigation, at their highest valuation to be under and below *fifteen thousand*, with the machinery. Here then, while the matter was still *in fieri*, before its consummation, was a discovered undisputed error of over \$10,000. To rectify it, required, if not a reformation of the party, at least, a reformation of the agreement. The machinery, it was obvious, consistently with any decent regard to fairness or even honesty, could not under those circumstances, be *taken* by Lowber, and the stipulation to that effect must be stricken out or abandoned.

Accordingly on the following day, the Monday on which the assets were to be given into Le Roy's hands, a schedule was furnished on behalf of Lowber, consisting of twelve separate items of property on hand, and among them the "machinery (mill and engine) \$5,300." Le Roy, it seems, was the owner of the premises; the delivery therefore of some of the articles, accompanied by the delivery of the schedule, was a delivery of the whole; and in my judgment, it was clearly, at the time, intended so to be, as well by Lowber as Le Roy. The opposite ground assumed by him a year afterwards, was merely an afterthought. And although it may serve to cancel on his part, all claims to credit for an honest amendment, it cannot, without the grossest injustice, deprive Le Roy

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of the small modification, which Lowber's previous repentance, (afterwards repented of) had actually conceded. The agreement, it seems to me, was actually reformed by the parties themselves in its execution. It "took effect," not as originally written, but as reformed. It was either a new agreement superseding and incorporating in part only, the letter of the previous day, and made wholly on the day of the consummation and delivery; or it was the correction of a mistake of fact in the previous agreement, and related back to the day of its inception. As a new substituted agreement, it was admissible, (although partly in parol) and was a perfect defence at law to the action in the Superior Court. That court, however, viewed it in a different light, and excluded the evidence as an attempt to vary the legal import of a written instrument by parol proof, or to reform a contract, on the ground of mistake, which as the practice then stood, could only be done by a direct bill in equity. The decision therefore placed in effect, as it was on the ground of a want of jurisdiction adapted to the relief sought, cannot now be invoked, as an estoppel, without manifest injustice. And on the whole merits of the case developed as they have been in the present suit, the judge at special term was himself of the opinion, in which we fully concur, that Lowber, after the discovery and acknowledgment of his mistake, had no just claim to the machinery; that he had indubitably and properly relinquished it to *Le Roy*; and that in doing so, instead of making a gift, he had only done what a court of equity would then have compelled him to do, and what, having done it voluntarily, a court of equity will now compel him to ratify, and not permit him to recall.

Instead therefore of dismissing the plaintiff's complaint, a decree should be entered, declaring that the provision contained in the agreement of dissolution, that Lowber should take the machinery and its appurtenances, was founded in mistake, and should be stricken out, and the agreement reformed accordingly, and that Lowber be perpetually enjoined from taking any further steps in this action at law referred to in the pleadings, and that he pay the costs of this suit, including the costs of the appeal.

MITCHELL, J.—I remain of the opinion expressed at the special term.

WESTERVELT *a.* FROST.*Supreme Court, First District; General Term, November, 1854.*

## INDEMNITY BOND.—VALIDITY.

A bond of indemnity given to the sheriff, upon execution, is not invalidated by the fact that it was given after levy and sale.

## Motion for a new trial.

Jacob Frost having recovered a judgment against J. W. Post, and one Crawford, his attorney issued execution thereon, to Westervelt, then sheriff. The sheriff levied the execution upon property appearing to belong to the execution debtors, but claimed by S. P. Post, and sold it. Before paying over the proceeds, he required a bond of indemnity, which was given by the present defendants, Frost, the execution creditor, and Asa Stebbins. It was in the usual form, in the penalty of one thousand dollars, and was ante-dated, appearing to have been given before the sale.

S. P. Post having recovered judgment for twelve hundred dollars and upwards, against sheriff Westervelt, in an action instituted in the Superior Court, for the taking of the property in question, that officer brought the present suit upon the indemnity bond.

The cause was tried before Mitchell, J., and a jury, 15 June, 1853, and a verdict rendered for the plaintiff, for one thousand dollars. A motion on the part of the defendants, for a new trial, was denied, and judgment rendered for plaintiff. The defendants appealed.

*Lewis* and *Brown* for defendants, contended that the bond was void, having been taken by the sheriff after, and not before he had committed the acts complained of. It was taken by *color* and not by *virtue* of his office.

*A. J. Vanderpool*, for plaintiff. Defendants as obligors, are estopped from denying the facts recited in the instrument itself, and nothing but fraud or an illegal purpose can be

shown. Hurlstone on Bonds, 32. Bowman v. Taylor, 2 *Ad. & E.* 278. Lee v. Clark, 1. *Hill*, 65.

ROOSEVELT, J.—Frost, it appears, was a judgment creditor. His debtors, although not in possession, were supposed by him to be the owners of certain goods. Another person, however, of the name of Post, claimed the ownership, and the sheriff accordingly before completing his execution, demanded of Frost a bond of indemnity, which was given. Post sued the sheriff for trespass in making a levy on the goods, and recovered a judgment for \$1228 04, which the sheriff had to pay, besides \$268 63, the costs of his defence. He now brings this action on the bond of indemnity, to reimburse his loss.

The defendants insist that the bonds under the circumstances, was unlawfully exacted. The goods it seems had actually been sold by the sheriff before he demanded the bond; but he refused (having received notice of the adverse claim) to pay over the proceeds without the bond of indemnity. Frost gave the indemnity, and demanded and received the avails of the sale, with full knowledge of the claim of Post. He thus not only ratified, but insisted on the sale; and having adopted the act of the sheriff—which it is not pretended was other than *bona fide*,—and his own attorney in the execution having even attended the sale, he was both legally and morally bound to abide by the consequences of a levy and sale made with his approbation and for his benefit. He should therefore be estopped from denying either the date of the bond which is before the sale, or the recitals in it, which are in conformity with the right of the case.

There is hardship either way. It was a great seeming folly on the one side to incur a liability of \$1000, on a judgment of less than \$100, and great seeming wrong on the other, to subject a public officer, acting in good faith, to the undivided loss of fifteen hundred dollars, for a commission perhaps not exceeding fifteen.

On the whole, the verdict for \$1000 in favor of the sheriff, (the extent of the penalty of the bond) would seem to do no more than justice to that officer. The sale was no doubt a most unfortunate one. Such was the damaged appearance of the

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goods in consequence of the fire, that although nearly one hundred persons attended the auction, scarcely one tenth the actual value of the goods was realized. Sheriff's sales, however, are never expected to come up to the standard of private bargains. The law requires them to be made by public auction, and of course assumes that the articles levied on, are to be disposed of at auction prices.

Judgment affirmed, with costs.

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BRADY a. BISSELL.

*New-York Superior Court ; Special Term, November, 1854.*

ARREST.—VERIFIED COMPLAINT.

Where the summons and complaint have been served, and were before the judge upon an application for an order of arrest, based upon affidavit, the plaintiff is entitled to refer to the complaint, if verified, in support of the order, where the affidavit proves defective.

Certain allegations of fraud inserted in a complaint, sustained.

Allegations of fraud in a complaint upon contract, do not change the substantial nature of the cause of action, nor render it non-assignable.

The facts sufficiently appear in the opinion of the court.

*J. Livingston*, for plaintiff.

*G. Schufeldt*, for defendant.

HOFFMAN, J.—An order of arrest was granted on the 6th of October, 1854, reciting that it appeared by affidavit that a sufficient cause of action existed, and that the case was one of those mentioned in the 179th section of the Code. The defendant was ordered to be held to bail in \$600. The affidavit was made by one Charles Jackson, stating that he had been a soldier in the Mexican war, had received a wound, and became entitled to a pension ; that the defendant had advertised he was an agent or attorney to collect pensions, and that at the defendant's solicitation, he (Jackson) had employed him to prepare the papers to obtain it, for which the defendant was to receive \$100 ; that defendant forwarded such papers to Washington. That on the 3d of June, 1854, defendant, by

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false representations of the difficulties in getting the pension, and the doubtfulness of the plaintiff's claim, obtained from him a paper which was read to him by defendant, and purported to be an assignment of all arrears of pension to defendant, for which the sum of \$200 was paid. That on the same day, and within an hour after such interview, Vanburgh Livingston, pension agent of the United States, paid to one Simeon Ward, who purported to be the attorney of plaintiff, the sum of \$559 73, the arrears of pension due the plaintiff. That the plaintiff never authorized Ward to receive such pension; but if he had any letter of attorney, the signature must have been obtained by fraud, and by Bissell's reading to him a different paper. It is then stated, that previous to the transaction with defendant on the 3d of June, the latter had obtained positive information that the pension had been allowed; that Bissell conspired with Ward to cheat him, and that defendant, through Ward, received the 559 73, and converted the same to his own use. This affidavit was sworn to on the 4th of October, and the order of arrest was dated the 6th. The complaint was sworn to on the 29th of September. Although it appears from the sheriff's certificate that the summons and complaint were not served by him with the order of arrest and affidavit, yet it is admitted that such service had been made on the 7th of October. It is now admitted that the summons and complaint were before the judge when he granted the order of arrest.

It is objected, that on the affidavit it does not appear that the plaintiff has any cause of action; and that the fact of the complaint being before the judge, cannot make a difference. It is stated in the complaint that Jackson, the pensioner, had assigned all his interest to him, the plaintiff, and the complaint demands judgment for the sum of \$559 73, and interest; but on the affidavit that does not appear. The 181st section provides that the arrest may be ordered in the cases in which it is at all allowed, upon the affidavit of the plaintiff, or of any other person, showing a sufficient cause of action to exist. It is reasonable to construe this as meaning a cause of action to exist in the plaintiff. By section 183, the order may be made to accompany the summons, or at any time afterwards, before judgment; so that the arrest would be void if made without

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service of a summons at the time, unless the suit had been commenced by a service previously. By section 184, the affidavit and order of arrest shall be delivered to the sheriff, who shall deliver a copy to the defendant. If the defendant had not been served with the complaint, he would have been arrested upon an affidavit which did not show any title to sue him, in the plaintiff. But the complaint was served on the 29th of September previous, and is now shown to have been before the Judge, although not referred to in the order, as one ground of its being granted. A sworn complaint is equivalent to an affidavit. In a late case, where the affidavit was in one point defective, but the defect was supplied by the complaint, I granted the order reciting that it appeared by affidavit, and the complaint duly sworn to, that a cause of action existed, &c. I am of opinion that where the summons and complaint has been served, and is laid before the judge, upon an application for an arrest upon an affidavit, the plaintiff is entitled to refer to it, in order to sustain the order where the affidavit itself is defective. In other words, both documents may be treated as forming the ground of the order, although but one of them is mentioned.

Upon the merits, if this difficulty is obviated, I should sustain the order of arrest. In the first place, the affidavit of Simeon Ward, produced by the defendant, states that Jackson executed, on the 30th May, nominally to him, but in fact for Manuel de Puga, a power of attorney and sale and assignment of all arrears of pension due on any pension certificate that might have been issued to Jackson. Under this, he states he received from Livingston on the 3d of June, 1854, \$559 48, as arrears of pension on Jackson's pension certificate up to the 4th of March, 1854. And yet it appears that on the 3d of June, 1854, he swore that he had no interest in the money to be received, either by any pledge, sale, assignment or transfer, and that he did not know or believe that the same had been so disposed of to any persons whatever. Again, he says, he is informed and believes, that the purchase, sale and assignment of the said Jackson's pension arrearages were made by said defendant on account of said Manuel de Puga. So Bissell says that Jackson offered to sell his claim for \$200, to

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The Chemical Bank *a.* The Mayor of New-York.

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be paid by De Puga, through defendant, as his agent, and for money paid and services rendered by the defendant as agent, in or about his (Jackson's) business; and said Jackson did then and there sell and assign in part to De Puga, although nominally to ward all such arrears of pension, and the proposition was by the defendant, as such agent, agreed to, and a contract between the parties then and there agreed. It is remarkable that Bissell no where explicitly denies having read some paper to Jackson, in his office, and getting him to sign it, purporting to transfer his pension claim; nor is there any explicit or intelligible denial of his having then some information that the pension had been allowed. I think there is enough in the case to sustain the arrest. The frame of the complaint, and of the order, is an employment of the defendant as agent to collect the pension, and fraudulent representations and acts by him, through which the pensioner was induced to transfer it to him for a small amount, and hence that the original cause of action is unaffected by any such transfer, and the defendant must be adjudged to pay the amount. If the complaint had stated the employment and reception of the money merely, and the answer had set up an assignment or transfer, no reply would have been allowed to state facts to set it aside. I see no objection to make allegations to that effect in the complaint, and they will not change the real nature of the action as one upon contract. This view answers the objection that the claim is not assignable, and also the motion to amend the complaint. Both motions are denied, with five dollars costs in each motion.

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THE CHEMICAL BANK *a.* THE MAYOR OF NEW-YORK.

*Supreme Court, First District; Special Term, November, 1854.*

ILLEGAL TAXATION.—DENIAL OF INJUNCTION.

An injunction to restrain the collection of a tax illegally assessed, cannot be granted. The case of *Wilson a. The Mayor*, (*ante* p. 4.) cited and approved.

*Quere*; whether an action for an injunction would not be the most convenient mode of calling in question the legality of a tax.

Application for an injunction.



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The Chemical Bank *v.* The Mayor of New-York.

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The Chemical Bank applied for an injunction to restrain the collection of a portion of a tax imposed upon their capital.

*S. W. Roosevelt*, for plaintiffs.

*R. J. Dillon*, for defendant.

MITCHELL, J.—The complaint shows, that the bank has surplus funds beyond its capital, amounting to \$426,000, of which nearly \$180,000 consists of investments in U. S. stocks; that these facts were duly established before the commissioner of taxes and the supervisor of the county, but were disregarded by them, and that the bank was taxed on the U. S. stocks as well as on its other surplus funds. The complaint then asks for leave to pay the rest of the tax, and that an injunction be granted to restrain the defendants from collecting the tax assessed on the U. S. stocks.

There can be no need of an order of the court for the bank to pay or tender such tax as it admits to be due, and if more be then unlawfully collected, the bank will have its remedy for that excess.

The other remedy, by injunction, the defendant's counsel insist cannot be granted. Judge Woodruff, of the Common Pleas, has, in an elaborate opinion, ably explained the decisions on the subject. (*Wilson v. Mayor of N. Y.*) The cases of *Meserole v. Brooklyn*, 26 *Wend.* 132, (reversing 8 *Paige*, 198;) *Van Doren v. Mayor of N. Y.*, 9 *Paige*, 388; *Livingston v. Hollenbeck*, 4 *Barb. S. C. R.*, 10; and *Bowker v. Brooklyn*, 7 *How. Pr. R.* 198, fully sustain the defendant's counsel, as the law stood before the Code was adopted; and the last case adopts the same rule under the Code. Justice Strong, who decided the last case, sums up his reasoning by saying, in substance, that a court of law only provides a redress for a wrong after it is committed: a court of equity grants its preventive relief before the wrong is done, but under certain limits, which exclude a case like this; that a court, in which the functions of both are joined, (as is the case now, under the Code,) cannot extend its power beyond what was formerly possessed by one court or the other previous to the junction of the powers of both courts in one.

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The Code allows an injunction when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or part of it, consists in restraining the commission or continuation of an act, the commission or continuation of which during the litigation, would produce injury to the plaintiffs. (*Code*, § 219.) It is not when the plaintiff is entitled to *any* relief, but to the relief *demand*ed. If, by the law, as it stood before, the plaintiff had no right to the relief sought in a suit in his own name, he has none now;—as the section does not profess to extend the relief which the plaintiff might claim in such a suit. If the only final relief which he demands is a judgment for an injunction, then he must show that by the law as it stood before, he was entitled to that relief. If the Code allowed the injunction wherever the plaintiff was entitled to any relief, either in his own name, or as relator in the name of the people; then if a *mandamus* or *certiorari* would lie, the preliminary injunction might be allowable, but such is not its language.

If the plaintiff will have a right of action against the collector or supervisors, after the tax shall be collected, that does not entitle him to the injunction, as in that case his cause of action will not accrue until the money shall be collected.

At the same time, it is very evident that there could be no simpler mode of settling such questions than by an action for an injunction. It brings up the precise merits of the case, as applicable to the individual aggressor alone, and does not involve in the suit the other tax-payers; it is subject to the equitable control of the court, and in that has a great advantage over an action brought for a trespass, when in some cases the whole assessment might be declared void, and he who was liable to pay a part be discharged from paying anything on account of an informality in the proceedings. But the strict law seems to favor the objection made by the defendants, and the motion for an injunction is denied, without costs.

PINCKNEY *a.* WALLACE.*New York Common Pleas ; General Term, November, 1854.*FORECLOSURE OF MORTGAGE.—POWERS OF SURVIVING PARTNER.—  
MISJOINDER OF DEFENDANTS.

A surviving partner has the power to assign any chose in action, *e. g.* a bond and mortgage belonging to the late firm.

A defendant properly joined cannot demur to the complaint for the misjoinder of another defendant.

Demurrer to complaint.

The facts sufficiently appear in the opinion of the court. We are not informed of the names of the respective counsel.

INGRAHAM, J.—From the complaint it appears that the action is to foreclose a mortgage given to secure a bond payable to Pierce and Peck as co-partners; that Peck is dead, and Pierce, as surviving partner, assigned the claim to Pinckney.

The defendant demurs to the complaint for two reasons.

*First.* For defect of parties in omitting the representatives of Peck.

*Second.* For error in making Mary Wallace a party without showing any right to make her a party.

I. The defect of parties can only be taken advantage of by demurrer when it appears on the face of the complaint.

In this case no such defect appears. The bond is averred to be payable to Pierce and Peck as co-partners, and upon the death of either, the title to the bond vests in the surviving partner. He has a right to collect all debts due to the firm, and to sell the property. His responsibility to the representatives of the deceased partner only exists after the partnership affairs are settled.

Having the right to collect and dispose of the property, he has the power for that purpose of assigning any chose in action belonging to the estate.

There is nothing on the face of the complaint to warrant the

conclusion that the representatives of Peck should be made parties to this action, and the demurrer cannot be sustained on that ground.

If in fact this bond and mortgage did not belong to the partnership, such fact may be shown upon the trial, and the plaintiff must then fail; but no such fact appears on the face of the complaint.

II. As to the second cause of demurrer, it is sufficient to say that a misjoinder of defendants is no ground of demurrer.

The complaint, however, must show that any person named as defendant has, or claims, an interest in the matter in controversy, or is a necessary party to a complete determination of the questions involved in it.

It is not averred that Mary Wallace is the wife of William Wallace. If it were so, that would show sufficient cause for making her a party. Even without that averment, the allegation that she has or claims an interest in the mortgaged premises, is sufficient to warrant making her a defendant. She is not under any necessity to appear, as no claim is made against her, and she can incur no liability by her non-appearance.

There would be much more cause of complaint if she had been omitted, than the defendant can have to her being made a party.

Judgment for plaintiff on demurrer.

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TUFFTS v. BRAISTED.

*New York Superior Court; General Term, November, 1854.*

JUDGMENT.—ACTION BY ASSIGNEE.

Section 71 of the Code, does not prohibit a *bona fide* assignee of a judgment from bringing an action upon it, without first obtaining leave of the court.

Appeal from an order dismissing summons and complaint.

The plaintiff, as assignee, brought an action upon a judgment recovered in this court, April 5, 1852, by A. D. Sage, against Braisted and Averill, the defendants. The defendants

moved to dismiss the summons and complaint upon the ground that the court had not granted leave to the plaintiff to bring the action, as required by section 71 of the Code. The motion was granted, and the plaintiff appealed to the general term.

*Breckenridge*, for plaintiff.

*H. W. Genet*, for defendants.

OAKLEY, C. J.—Prior to the Code, a plaintiff, in a judgment, could bring an action upon it, as a matter of course, and of strict right. An assignee of a judgment could do the same, only he was obliged to sue in the name of the assignor. The only way in which a judgment-debtor could arrest such a proceeding, was by paying the judgment.

The Code not only allows, but requires the assignee of any demand, to prosecute any action that may be brought upon it, in his own name, (§ 111.)

Omitting what is said of judgments in justices' courts, § 71 declares that "*no action shall be brought upon a judgment rendered in any court of this State, between the same parties, without leave of the court, on good cause shown, on notice to the adverse party.*" Whether the order appealed from is erroneous, depends upon the construction that should be put on the words "between the same parties."

We think the natural meaning of the words is, that no party in whose favor a judgment is rendered, shall bring an action upon it against those against whom it is rendered, without leave of the court. The Code did not intend to prohibit the bringing of an action on a judgment by any and every person, without the express permission of the court. If it had, it would have omitted the words "between the same parties." This is not nominally, nor in substance, an action between the same parties. The plaintiff was not interested in, nor privy to, the recovery of the judgment. He has become the owner of it, by purchase and assignment.

We suppose the object of the statute was to prohibit suing upon a judgment, when there could be no motive for it, except to accumulate costs. But the reason of the statute, if that was the sole reason for it, would seem to apply with as much force to the assignee as to the assignor of a judgment.

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Mason a. Whitely.

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We are not aware, however, of any complaints, that suits have brought, with such motives, at the instance of the assignees of judgments. The advantages to an assignee, in recovering a judgment in his own name, are obvious. Such a recovery furnishes record-evidence, that no equities existed between the assignor and the judgment-debtor, at the time of the assignment, which entitle the latter to exemption from paying the debt. It puts it out of the power of the assignor to discharge the judgment, or affect the rights or remedies, of his assignee. The latter is not subjected to the necessity of relying on the uncertainty of human memory, to prove notice to the judgment-debtors of the fact of the assignment, nor of the time when such notice was given. We do not feel at liberty to extend, by construction under such circumstances, the common and natural meaning of the words, "between the same parties." As the Code only prohibits an action between such parties, we do not feel authorized to hold that parties, not prohibited by that section from bringing an action, shall not bring one. Under this view of that section of the Code, the order appealed from must be reversed, but without costs.

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MASON a. WHITELEY.

*New York Superior Court; Special Term, December, 1854.*

## AMENDMENT OF COMPLAINT.—NEW COUNTS.

On amending a complaint when it is done under § 172 of the Code, as a matter of course and of right, a plaintiff may add a new cause of action.

The only restrictions imposed on a plaintiff are, that he shall not amend for the purposes of delay, nor to prevent a trial at a term for which the action is or may be noticed to be tried; and that the cause of action added be one that may properly be united with the one contained in the original complaint.

## Motion to strike out an amended complaint.

The original complaint in this action was by husband and wife, for an assault and battery, alleged to have been committed by defendant upon the wife; and was drawn substantially in the common form. The defendant answered without awaiting the expiration of the twenty days, making a general denial.

Subsequently, and within twenty days from the service of the original complaint, the plaintiffs served an amended com-

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Mason *a.* Whitely.

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plaint. The amendment consisted in the addition of a second count, setting forth that at the time and place of the alleged assault and battery averred in the original complaint, and repeated in the amended one, the defendant also unlawfully restrained the female plaintiff of her liberty, &c.

The defendant moved at special term before the Ch. Justice, to strike out the amended complaint, upon the ground that the amendment amounted to the addition of a new and distinct cause of action.

*B. Skaats*, in support of the motion, cited *Hollister a. Livingston*, 9 *How. Pr. R.* 140.

*B. V. Abbott*, in opposition. It has been understood in this court, that the plaintiff may thus amend, as of course. (*Penny v. Van Cleef*, 1 Hall, 165. *Magrath v. Van Wyck*, 2 Sandf. 651. *Jeroliman v. Cohen*, 1 *Duer*, 629.) This practice is upon the whole supported by the practice of the Supreme Court, as adopted since the Code. 1 *Mon. Pr.* 2 *ed.* 371. *Getty v. Hudson River R. R. Co.* 6 *How. Pr. R.* 269.

OAKLEY, CH. J.—The complaint was amended under § 172 of the Code. The motion is made on the ground, that under that section a plaintiff cannot amend, by adding a new and distinct cause of action. Thence is no such restriction imposed by that section of the Code. The only limitation upon the right to amend, on the nature of the amendments to be made is, that it shall not be done for the purpose of delay, nor under such circumstances as to prevent a trial at a "term for which the cause is, or may, be noticed." Neither of these objections are alleged to exist. Under the rules and practice of the courts, as they existed prior to the Code, a party, on amending as a matter of course, could add new counts or pleas.

Supreme Court. Rules of 1829. Nos. 20 and 21.

Superior Court. Rules of 1834. No. 33.

New York Com. Pleas. Rules of 1834. Nos. 28 and 29.

The Code allows, on an amendment made under § 172, the insertion of any new causes of action that can properly be united in a complaint.

The motion must be denied.

(*DUER*, *CAMPBELL* and *BOSWORTH*, J. J., concurred.)

## DWINELLE a. HOWLAND.

*Supreme Court Circuit, New York County; December, 1854.*

## TESTIMONY TAKEN UPON COMMISSION.—PROPER MODE OF RETURN.

The power to issue a commission to examine witnesses abroad, is an innovation upon the common law, and should be strictly exercised.

Where a commission is returned by an agent, his affidavit, as prescribed by statute, that he received it from the hands of the commissioners, and that it has not been opened or altered since he received it, is indispensable, unless waived by consent. A commission returned by express and unaccompanied by such affidavit, *held*, inadmissible; although so returned pursuant to the order awarding the commission.

This was a ruling at circuit, rejecting certain evidence.

The plaintiff, on the 22d of December, 1853, applied to the special term of this court, for leave to issue a commission in this action on the part of the plaintiff, to be directed to certain commissioners in San Francisco in California, authorizing them to examine on oath upon interrogatories and cross interrogatories, certain witnesses on behalf of the plaintiff, residing in California. The court made an order awarding the commission.

This order provided that the commission and the return thereto when taken, might be transmitted either by mail, or by either of the Express Companies doing business between New York and San Francisco, and that the return to such commission, be directed to Richard B. Connolly, clerk of the City and County of New York, at the City of New York.

The commission *was not returned by mail*, but had an endorsement upon it, in the following words:

“Deposited in the letter bag of Adams & Co. Express, at San Francisco, this 31st of May, 1854, by me,

“B. F. VOORHEES, Commissioner.”

On the trial, the plaintiff offered to read in evidence certain depositions annexed to the commission.

The defendants objected to the reading of the depositions in evidence, on the ground that there was no affidavit of any agent, to whom the commission and return were delivered in San Francisco, showing that the agent received the commission and return from the commissioners, and that the same had not



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Dwinelle *v.* Howland.

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*been opened or altered, since he so received it; and because it did not appear how, or in what manner the commission and return had been transmitted from California to the clerk of this court in New York.*

The plaintiff, for the purpose of obviating the objection, offered to prove by a witness, that the uniform course of business on the part of Adams & Co., and all other Express Companies doing business between San Francisco and New York, is, that letters are deposited at San Francisco, by the parties sending them, in the letter bags of the Express Companies; that the letters thus deposited are taken care of by the office agents at San Francisco, and that when the steamers are ready to sail, the letter bag is closed, and put in charge of a messenger, not one of the office agents who receives letters; that such messenger generally accompanies the bags containing the letters to New York, but some times delivers them to another messenger at Panama or Aspinwall; that the bags are brought to the office of Adams & Co., in New York, when the duty of the messenger is at an end; that then the uniform course of business is, that some other agent or clerk of the Express Company, delivers the letters to the persons to whom they are addressed; that the firm of Adams & Co., is composed of three persons, one residing in San Francisco, one in New York, and one in Boston, and that by the uniform course of business, neither of the partners attend to the reception or delivery of letters sent by their Express. The defendants objected to the testimony, and the judge sustained the objection, and excluded it, and held that the depositions could not be read in evidence.

The plaintiff was permitted to withdraw a juror.

The reasons for rejecting the evidence were afterwards reduced to writing by Mr. Justice Clerke.

*C. P. Kirkland*, for plaintiff.

*N. Chase*, for defendants.

CLERKE, J.—I. At common law, no commission to examine witnesses abroad on interrogatories could issue without consent; although a court of equity could, in aid of an action in a common law-court, compel an obstinate party to consent.

In England, the common law-courts had no general power to issue commissions, until the Act passed as recently as the reign of William IV. (1 *W. IV.*, *C.* 22).

Our courts have possessed this power for more than sixty years; but, it was always considered an innovation, which should be exactly dealt with, as a departure from a mode of presenting evidence, which has ever been justly considered one of the best safeguards in the trial of facts.

The presence of the witness at the trial, and his oral examination before the jury, is, under our system, a favorite and almost indispensable requisite; and, among numerous other usages, distinguishes the common from the civil law. Any statute encroaching upon this usage, like any other in derogation of the practice of the common law, must be strictly observed.

II. The *Rev. Statutes* (2 v. 394) prescribe only two methods of returning a commission: either 1, by depositing it in the nearest post-office; or 2, returning it by an agent of the party who has sued out the order or writ, according to the direction made by the judge or court—no other mode is contemplated. In this case, it was provided that the commission might be returned either by mail, or by an agent,—an express company. Section 25 of the statute provides, that, if the packet be delivered to an agent, he, on delivering it to the clerk or judge, shall make an affidavit, that he received the same from the hands of one of the commissioners, and that it has not been opened or altered since he so received it. Indeed, the whole article is very exact and minute in its precautions to prevent abuse, and to insure the genuineness of the evidence. A rigorous compliance with its provisions was evidently intended, particularly in regard to the return of the commission. The affidavit, that it has not been opened or altered, is indispensable, unless expressly dispensed with by the written consent of the adverse party. It is no answer to say, that, in this case, after the order was so made at special term, allowing the commission, and directing the mode in which it should be returned, both parties signed a similar direction in the body of the commission. At the most, the adverse party, in doing this, consented to the appointment of the agent designated by the party suing it out;

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In the Application of Clark.

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—it was no waiver of the provisions of the law requiring full proof of the authenticity of the evidence. Nor is it any answer to say, that according to the practice of the express companies this provision could not be complied with, inasmuch as no one person employed in any of those companies accompanied the express the whole route. If the party suing out the commission knew this, he ought to have communicated it to the other party, if he thought this mode of transmission was preferable to the mail; if the other party refused to dispense with the affidavit verifying the return, the only course left was, to have the return made by mail.

III. It does not appear that anything was suggested to the court, or to any of the parties, that a compliance with the statute was not practicable. At all events, the court cannot dispense with this requirement, without consent. The depositions cannot be read.

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IN THE APPLICATION OF CLARK.

*Supreme Court Circuit, Dutchess County, December, 1854.*

## NATURALIZATION—DUTIES OF THE COURT.

The powers conferred by the General Government upon the State Courts to admit aliens to citizenship, cannot be delegated to the clerks of those courts. They must be exercised by the courts themselves, upon a judicial examination of each case.

Application for admission to citizenship.

The facts sufficiently appear in the opinion of the court.

DEAN, J.—The petitioner, a native of Scotland, applied to the clerk of this court for admission as a citizen. A number of other aliens made a like application. The clerk was proceeding to administer the formal oath to the witnesses of the respective applicants when the subject was brought to my notice, and on inquiry I learned that the practice had, for many years, been for the clerk to receive and pass upon all applications for naturalization, and grant certificates without

consulting the court, and that the proof on which aliens were admitted to citizenship, did not ordinarily meet any one of the requirements of the statute. On this state of facts I deemed it my duty to forbid the clerk from entertaining any applications of this nature, directing that all should be made to the court. The application was then made to the court, and on examination I found that neither Clark, or any one of the other candidates for citizenship, could furnish proof of continuous residence within the United States, to exceed two or three years, and that each of the applicants was unprepared with any proof as to his conduct or character, during even that brief period. As this decision must change the practice in naturalization cases in this court, and affect it in others, it is due to the importance of the subject, that the reasons on which it is founded should be given.

There are probably no laws of a public character so imperfectly understood and so badly administered as those for the naturalization of foreigners. Among the powers which were by the States delegated to Congress was the one "to establish a uniform rule of naturalization." This power was exercised the year after the formation of the government by an act approved by Washington, March 26, 1790. Again in 1795 and in 1798, in an act approved by President Adams. All these acts were repealed in 1802, during the presidency of Jefferson, when the act was passed, which, though it has often been modified in unimportant particulars, and in a few instances materially changed, is the one now in force, and under which the courts derive their jurisdiction to act in the premises. One reason why these laws are so imperfectly understood and so badly administered, is, that the statutes of the United States have little application to the affairs of the States, and the best lawyers of the several States are usually ignorant of their provisions. By the laws to establish a uniform rule of naturalization, any court in the State possessing common law jurisdiction, a seal and a clerk, can exercise the powers of admitting aliens to citizenship. The judges of these State courts, ordinarily familiar only with the laws of their own State, have their time occupied by attending to what they regard as their judicial duties, and permit, if they do not order,

applications for naturalization to be made to the clerk, whose knowledge of the laws is derived from the printed blanks which he fills up and signs, on receiving his fees. By this practice, which, on inquiry, I find is general, if not universal, certificates of citizenship are issued indiscriminately and illegally, without a compliance on the part of the alien with any of the requirements of the statutes, except taking the oath of allegiance.

The first section of the act of 1802, to which I have referred, contains the following provision :

“Any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise :

“1st. That he shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the States, or of the territorial districts of the United States, or a circuit or district court of the United States, three years, (this, by amendment, is now two years,) at least before his admission, that it was, *bona fide*, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof such alien may, at the time, be a citizen or subject.

“2dly. That he shall, at the time of his application to be admitted, declare, on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject ; which proceedings shall be recorded by the clerk of the court.

“3dly. That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least ; and it shall further appear to their satisfaction, that during that time he has behaved as a man of a good moral character, attached to the principles of the

constitution of the United States, and well-disposed to the good order and happiness of the same: *Provided*, That the oath of the applicant shall, in no case, be allowed to prove his residence."

It will be seen that the court, and not the clerk of the court, is to admit the alien. And that, as the court, before admitting him, is to be satisfied of certain facts, it follows that the powers conferred upon the courts are judicial and not ministerial or clerical, and consequently that these powers cannot be delegated to the clerks, but must be exercised by the court, and their exercise requires an examination into each case sufficient to satisfy the court of the following facts:

1. Five years continuous residence of the applicant within the United States, and one year of like residence within the State or territory where the court to which the application is made, is held.

2. That the applicant during the five years has conducted himself as a person of good moral character.

3. That the applicant is in principle attached to and well disposed towards the constitution of the United States.

The "continuous" residence would not perhaps be necessary from the language of the section I have quoted; but an amendment, approved March 3, 1813, by President Madison, provides:—

"That no person who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States."

This amendment is now in force, except the words "without being at any time during the said five years out of the territory of the United States." These words were, in 1848, in "an act for the regulation of seamen on board the public and private vessels of the United States," struck from the section. The object of the amendment of 1848 was to allow seamen who were actually engaged on any of the public or private vessels of the United States, and thus in their business were

necessarily beyond the limits of our territory, to avail themselves of the naturalization laws; but the person drawing the repealing clause made it general instead of an exception in their favor. Whether Congress should not restore this provision, making an exception in favor of the seamen and the soldier, it is not for me now to say, as I am inquiring only what the law is, that it may be administered correctly by this court. From the parts of the laws of Congress to which I have referred, I think there can be no doubt of the correctness of the position I have taken on this subject, and that the practice of the clerks in issuing certificates of citizenship without any application to the court, and on proof of residence only, is an abuse which needs to be corrected. It was never intended by those who enacted the act for the naturalization of aliens, that persons who had been transported for crime—that those who came over here merely because Europe was too full for them—but who retained their loyalty of feeling for the monarchies they had left should, because they remained here for the period of five years, be entitled to admission to citizenship. The intention was to permit those who came here from abroad seeking a permanent home—who, by five years of continuous residence, manifested that intention—and by good behavior during all that time, and an attachment to republican principles, which could be proved to the satisfaction of a court, had shown themselves worthy recipients of the benefits to be derived from citizenship, and safe depositories of the powers it confers, to be admitted to these rights and the exercise of these powers, by an order entered in open court after an examination into the facts of each case—and a judicial decision upon the application—an examination which should be conducted with the same care, and a decision which should be made with the same deliberation and solemnity as that which should accompany every other judicial act. Those courts which, instead of administering this law, have by their negligence and inattention practically repealed it, admitting thousands to the rights of citizenship, who want all the requisites to entitle them to such admission, have been guilty of a gross violation of duty, and have made the law itself odious in public estimation. Of the wisdom or propriety of our

present, or of any naturalization laws, it is not my business at this time to speak: my duty now is to administer the laws as they are. I am compelled, for the reasons I have stated, to deny the prayer of the applicant, and also to forbid the clerk from, in any manner, exercising the powers conferred by Congress upon the courts. This is all that is necessary for me to say in deciding the case now before the court; but there are other provisions of the naturalization laws which are loosely interpreted, or wholly misunderstood. By the act of May 26, 1824, the period between the declaration of intention and granting the certificate of citizenship is reduced from three to two years; but this in no manner affects the requirements of five years previous continuous residence. The first section of the same act prescribes a different rule for the naturalization of aliens who arrive in this country prior to attaining the age of eighteen; it is:—

“Any alien, being a free white person, and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States without having made the declaration required in the first condition of the first section of the act to which this is an addition, three years previous to his admission: Provided, such alien shall make the declaration required therein at the time of his or her admission; and shall further declare, on oath and prove, to the satisfaction of the Court, that for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States, and shall in all other respects comply with the laws in regard to naturalization.”

The practical construction of this provision I am informed is for the clerks to admit aliens who will make oath they arrived during their minority, on proof of three years residence. The true construction is, that it merely does away with the necessity of a previous declaration of intention to become



a citizen, on the part of those who arrive in the country prior to attaining the age of eighteen years, but requires instead of such previous declaration, the oath of the party, and also proof that for three years next preceding, it has been the intention of the alien to become a citizen, but in all other respects, the act of 1802 and its amendments are to be complied with by the person who applies under this section. The act of 1802 provided that no person arriving after the passage of that act, should become a citizen, unless he had his name, birthplace, age, nation, &c. registered in the clerk's office where he arrived ; and also the place of his intended settlement, and required that the clerk should record this in his office, and grant certificates. In 1816, an act still more stringent in its requirements as to the evidence in cases of naturalization, was passed and remained in force until 1828, when these provisions were wholly repealed. There are several other statutes relating to the subject of naturalization, which are not formally repealed, but which have become obsolete for want of persons to whom they can be applied. The man who would collect and embody in a single act the operative portions of the various statutes on this subject, with such amendments as experience has shown are necessary to their due and faithful execution, would be a public benefactor. While they are, as now, scattered through the laws of Congress from 1802 down to 1848, it cannot be expected that the judges of the various courts will undertake the task of ascertaining exactly which section and line or word is in force, and which is repealed, consequently the administration of these laws will be loose and defective until such an act is passed. And when that is done, and the laws are administered in their purity, it will be apparent that the faults have been far more in the administration than in the laws themselves.

## DOBSON v. PEARCE.

*Court of Appeals ; December Term, 1854.*FRAUDULENT JUDGMENTS.—EFFECT OF DECREE OF A COURT OF  
ANOTHER STATE.

It is a good defence to an action upon a judgment,—whether brought by the original judgment creditor or his assignee,—that the judgment was fraudulently obtained.

A court of equity has jurisdiction to make a decree restraining a judgment creditor from bringing suits upon his judgment, upon the ground that it was fraudulently obtained.

A duly authenticated record of such a decree, rendered in a court of equity of another State having jurisdiction of the parties, is a *conclusive* defence against the prosecution in a court of this State, of a suit upon the judgment referred to in the decree.

Such decree is conclusive upon the parties everywhere and in every forum, where the same matters are drawn in issue; not indeed as an injunction, but as a judgment of a court of another State.

## Appeal from judgment upon a verdict.

This was an action in the nature of an action of debt on a judgment rendered in the New York Superior Court, April 17, 1847, for \$612.93, in favor of one James N. Olney, against Abner T. Pearce, the defendant, and afterwards assigned to Thomas Dobson, the present plaintiff.

From the answer, it appeared that the judgment sued upon was fraudulently entered up by Olney. The defendant was a resident of Connecticut; but being casually in the city of New York in 1846, Olney procured a *capias* to be served upon him; and by assurances that no further proceedings should be taken in the suit so commenced, induced him not to appear; and in consequence of his non-appearance, judgment was, without his knowledge, entered up against him by default. About two years afterwards, Olney commenced an action of debt on this judgment, in the Superior Court of the State of Connecticut. While this action was pending, the defendant commenced a suit upon the Chancery side of the Superior Court of Connecticut, complaining that the judgment upon which he was

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Dobson *v.* Pearce.

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sued at law, was fraudulently procured against him, and was based upon an unfounded claim; and praying that Olney might be perpetually enjoined from prosecuting the suit upon it. On the tenth of September, 1850, an attorney having appeared for Olney in the chancery suit, and proofs having been put in, it was decreed that the facts alleged by Pearce against Olney in relation to the fraudulent entry of the judgment, and the character of the claim upon which it was based, were true; and Olney was enjoined against prosecuting his action then pending against Pearce, upon the judgment. He accordingly withdrew the action, and judgment was rendered for Pearce, the defendant. But on the following day, Olney assigned the original judgment to Dobson the present plaintiff; who although acquainted with the facts above stated, commenced this action upon it.

The reply denied the allegations of the answer.

The cause was three times tried.

Upon the first trial, before Mr. Justice Paine, June 19, 1851, after the plaintiff had proved the judgment, and the assignment of it by Olney, to himself, the defendant offered in evidence a record duly authenticated of the proceedings in the chancery suit in Connecticut, including the decree, and moved for a dismissal of the complaint, on the ground that the plaintiff was estopped and barred from prosecuting his suit, by the adjudication of the Superior Court of Connecticut. The court decided that the decree of the Superior Court of Connecticut did not constitute any such bar or estoppel, and denied the motion; and defendant's counsel excepted.

The defendant's counsel then offered the same record in evidence, as matter of defence to the suit. The plaintiff's counsel objected, and the evidence was excluded; the defendant's counsel excepting. A verdict was, by direction of the court, found for the plaintiff. The defendant moved to set this verdict aside, which motion was directed to be heard at general term. The court at general term granted the motion and ordered a new trial.\*

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\* The proceedings in the case before the general term are reported 1 *Duer*, 142. See also 10 *N. Y. Leg. Obs.*

At the second trial, before Mr. Justice Campbell, January 3, 1853, after the plaintiff's evidence was in, the defendant offered in evidence the record of the proceedings in the Superior Court of Connecticut, which was admitted, subject to exception on the part of plaintiff, and moved for a dismissal of the complaint, on the ground as before; that the Connecticut decree estopped the plaintiff. The plaintiff's counsel opposed this motion, and read in evidence, subject to exception by defendant, the record of the proceedings in the suit commenced by him at law in Connecticut, to recover upon the judgment now in suit. According to the record, the suit at law was withdrawn before the decree in equity restraining its prosecution was made, instead of afterwards, as intimated in defendant's answer. Plaintiff also offered evidence to prove that the decree in equity of the Connecticut Superior Court was fraudulently procured, and without any notice to Olney of the institution of the suit. The court refused to receive this evidence, deciding that the record of the proceedings in the chancery suit could not be collaterally impeached; and dismissed the complaint, entering judgment for the defendant.

The plaintiff appealed from this judgment to the general term; where it was reversed for error in the exclusion of the evidence offered by plaintiff, and a new trial ordered.

This third trial was had before Mr. Justice Duer, April 5, 1853, and the evidence offered on the part of both plaintiff and defendant, at the previous trial before Justice Campbell, was put in, subject to like exceptions. The court instructed the jury that the Connecticut decree was conclusive upon the plaintiff, if the jury found that Olney appeared in the chancery suit by his authorized attorney; otherwise he was not bound by it.

The jury found for defendant; and judgment having been afterwards rendered in his favor at special term, the plaintiff appealed to the general term, where it was affirmed.

From this judgment the plaintiff appealed to the Court of Appeals.

*E. Terry*, for appellant.

*A. Childs*, for respondent.

JOHNSON, J.—The questions in this cause arise upon two exceptions taken at the trial. The first was taken to the decision admitting in evidence the record of a decree in equity, made by the Superior Court of Judicature of the State of Connecticut, between the defendant in this suit and one Olney, the immediate assignor to the plaintiff of the judgment now sued upon. The second was to the instruction of the court to the jury, that the record of the proceedings, finding, and decree aforesaid, given in evidence by the defendant to support the allegations in his answer, was, for the purposes of this suit, conclusive evidence upon the plaintiff, if the jury found that Olney appeared in that cause by his authorized attorney.

The plaintiff is in the same position which Olney would have occupied had he been plaintiff; he is the immediate assignee of Olney, against whom, before the assignment, the decree was pronounced; and if it be material, he had actual notice of the decree when the assignment was made to him. Giving to the plaintiff's objections to the admission of the record the broadest effect, the first question is, whether the defence set up by the answer was available. That defence is, in substance, that the judgment sued upon was *fraudulently entered* up, after assurances on behalf of the plaintiff in that suit, to the defendant, that no further proceedings should be taken in the suit without notice to him, whereby he was induced not to take steps to interpose a defence, which in point of fact he could successfully have maintained.

Relief against such a judgment upon these facts would have been within the power of a court of equity in this State, upon a bill filed for that purpose. (2 *Story, Eq. Jur.*, §§ 887, 896. *Huggins v. King*, 3 *Barb.*, *S. C. R.*, 616). The Code (§ 69) having abolished the distinction between actions at law and suits in equity, and the forms of all such actions as heretofore existing, an equitable defence to a civil action is now as available as a legal defence.

The question now is, ought the plaintiff to recover? and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance.

The next question is, whether the record of the decree of the Superior Court of Connecticut was competent evidence upon

this issue. Olney actually appeared by his attorney in that suit, and was heard upon its merits. He was, therefore, before the court, and it had jurisdiction of his person, if it had jurisdiction of the subject matter of the suit. The object of the suit was to restrain Olney from prosecuting a suit at law in the same court upon the judgment in suit here, and the grounds on which that relief was sought were the same which are set up as a defence here. The jurisdiction to restrain suits at law being one of the firmly established parts of the authority of the courts of equity, and the plaintiff in the suit which was enjoined having undertaken to prosecute that suit in a court of law in the State of Connecticut, the only conceivable grounds for denying the equitable jurisdiction which was exercised in the case, are either that no court of equity anywhere had power to restrain a suit upon a judgment at law upon such grounds, or that a court of equity *in one State* has no jurisdiction to restrain such a suit upon a judgment of a court of law of another State. The first of these grounds has already been considered and found unsound. The other rests either upon some ground of comity between States, or upon the force of the constitution and laws of the United States.

The objection, so far as it is founded upon an assumed violation of the comity which exists between the several States of the United States, does not reach to the jurisdiction of the court.

The rules of comity may be a restraint upon a court in the exercise of an authority which it actually possesses, but it is *self-imposed*. (*Bank of Augusta v. Earle*, 13 *Pet.*, 519). The courts of each State must judge for themselves exclusively how far they will be restrained, and in what cases they will exercise their power, except where the constitution of the United States and the laws made in pursuance of it prescribe a rule; where that is the case, the question ceases to be one of comity, and becomes one of right.

The question then remains to be considered upon the constitution and laws of the United States, and here the decisions permit of no doubt.

"Full faith and credit" are given to the judgment of a State court, when in the court of another State it receives *the*

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*same faith and credit* to which it was entitled in the State where it was pronounced. (*Hampton v. McConnell*, 3 *Wheat.*, 234). We have then a decree of the Superior Court of Connecticut, in a cause where they had jurisdiction of the subject matter and of the parties, and it is duly authenticated and relevant to the issue on trial. Its admissibility in evidence follows, of course.

By the record of that decree, it appears that the very matters in issue here were litigated there, and were decided adversely to Olney, whom the plaintiff represents. The determination is necessarily conclusive upon him as to all the material facts there litigated and determined.

Judgment affirmed with costs.

ALLEN, J.—A judgment rendered by a court of competent jurisdiction cannot be impeached *collaterally* for error or irregularity, but is conclusive until set aside or reversed by the same court, or some other court having appellate jurisdiction. (*Smith v. Lewis*, 3 *J. R.*, 157; *Homer v. Field*, 1 *Pick.*, 488.) *The jurisdiction* of the court in which a judgment has been rendered is, however, always open to inquiry, and if it has exceeded its jurisdiction, or has not acquired jurisdiction of the parties by the due service of process, or by a voluntary appearance, the proceedings are *coram non judice*, and the judgment is void. The want of jurisdiction has always been held to be a valid defence to an action upon the judgment, and a good answer to it when set up for any purpose.

So, fraud and imposition invalidate a judgment, as they do all acts, judicial as well as extra-judicial; and it is not without semblance of authority that it has been suggested, that at law the fraud may be alleged whenever the party seeks to avail himself of the result of his own fraudulent conduct by setting up the judgment, the fruits of his fraud. (See per Thompson, C. J., in *Borden v. Filch*, 15 *Johns. R.* 121, and cases cited.)

But whether this be so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident unmixed with any fault or negli-

gence in himself or his agent, will justify an interference by a court of equity. (*Reigal v. Wood*, 1 *Johns. Ch. R.* 402; *McDonald v. Neilson*, 2 *Cow. R.* 139; *Duncan v. Lyons*, 3 *Johns. Ch. R.* 351; *Marine Insurance Company of Alexandria v. Hodgson*, 7 *Cranch*, 352; *Shottenkirk v. Wheeler*, 3 *Johns. Ch. R.* 275).

Under our present judiciary system the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits are abolished, and the defendant may set forth by answer as many defences as he may have, whether they be such as have been heretofore denominated *legal* or *equitable*, or *both*. (Code § 69, § 150). The Code also authorizes affirmative relief to be given to a defendant in an action, by the judgment, (§ 274). The intent of the legislature is very clear, that all controversies respecting the subject matter of the litigation should be determined in an action, and the provisions are adapted to give effect to that intent.

Whether, therefore, heretofore, fraud or imposition in the recovery of a judgment could have been alleged against it collaterally *at law*, or not, it may now be set up as an equitable defence to defeat a recovery upon it. Under the head of equitable defences are included all matters which would before have authorized an application to the Court of Chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are, therefore, proper matters of defence, and there was no necessity or propriety for a resort to a separate action to vacate the judgment.

In Connecticut, although law and equity are administered by the same judges, still the distinction between law and equity is preserved, and justice is administered under the heads of common law and chancery jurisdiction, by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that State was proper, if not necessary.



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The right of the plaintiff in the judgment was a *personal* right, and followed his person, and, aside from the fact that he had resorted to the courts of Connecticut to enforce his claim under the judgment, the courts of that State, having obtained jurisdiction of his person by the due service of process within that State, had full power to pronounce upon the rights of the parties in respect to the judgment, and to decree concerning it. It necessarily follows that the decree of the Supreme Court of Connecticut, sitting as a court of chancery, directly upon the question of the fraud, is conclusive upon the parties to that litigation, and all persons claiming under them with notice of the adjudication. The judgment of a court of competent jurisdiction upon a point litigated between the parties, is conclusive in all subsequent controversies, when the same point comes again in question between the same parties. (*White v. Coatsworth*, 2 *Seld.* 137; *Embury v. Conner*, 3 *Connst.* 522). In the State of Connecticut it is quite clear the question of fraud would not be an open question between the parties, but would be considered entirely settled by the decree of the court of that State, and as "full faith and credit" is to be given by each State, to the judicial proceedings of every other State, that is, the same credit, validity and effect as they would have in the State in which they were had, the parties are concluded in the courts of this State by the judgment of the court in that State, directly upon the question in issue. (*Hampton v. McConnell*, 3 *Wheat.* 234). The decree of the court of chancery of the State of Connecticut, as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficiency, and, as an injunction, does not affect the courts of this State; but the judgment of the court upon the matters litigated is conclusive upon the parties, everywhere and in every forum where the same matters are drawn in question. The court acquired jurisdiction of the parties by the commencement of the action and the service of process upon the defendant therein, and his appearance by an authorized attorney, and the withdrawal of the action of debt upon the judgment did not deprive it of jurisdiction thus acquired. The judgment of the Superior Court must be affirmed with costs.

DENIO, J., (stated the following as the conclusions to which he had arrived).

1. The judgment of the Superior Court in New York, notwithstanding the alleged fraud, was conclusive upon the defendant in it; and in an action upon it, no allegation of matter of fact, *in pais*, could be admitted to impeach its validity. It could only be relieved against on motion, or by an action in the nature of a bill in equity.

2. It was, under the constitution and laws of the United States, equally conclusive in the courts of Connecticut as in this State.

3. But it was competent for the courts in this State, or in any other State which had obtained jurisdiction of the person of the plaintiff, by a *direct* proceeding, to impeach the equitable obligation of the judgment on the ground of fraud, surprise, or mistake in obtaining it, or for any other matter which, according to the principles of a court of chancery, would render it inequitable and unconscionable for the plaintiff to insist upon the recovery.

The jurisdiction of courts of equity in this respect is well stated in *Pearce v. Olney*, (20 Conn. 544,) where the question upon this judgment was examined by the Supreme Court of Errors of Connecticut. (See also 2 Cowen, 193, and cases cited).

4. If a court in this State, in such a suit as is referred to under the last head, had given judgment to the effect that the judgment of the Superior Court had been obtained by fraud or mistake, or in such a manner in any respect that it could not be conscientiously enforced, such determination would have been a bar in an action at law on such Superior Court judgment. It would have been similar to a decree in chancery setting aside a contract or conveyance, which it cannot be doubted would have barred an action at law on such contract or conveyance. "

5. The judgment or decree of the Supreme Court of Errors in Connecticut (that court having jurisdiction of the parties) is equally effectual as a judgment to the same effect in this State would have been. This results from the constitutional provision before referred to, and the act of Congress which

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declares that the records of judicial proceedings of the States, authenticated as provided by that act, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (Laws U. S. by *Story*, p. 93).

6. The judgment of the Supreme Court of Judicature of Connecticut, determining that the facts set forth in the defendant's petition were true, and forever enjoining a prosecution of the judgment of the Superior Court of New York, is a determination as to the equitable validity of the judgment, and precludes the plaintiff from insisting upon it, as well in every State where the judicial proceedings of Connecticut are entitled to full credit, as in the State of Connecticut itself. This results from the principle, that a matter once litigated and determined in a court of competent jurisdiction cannot ever again be drawn in question by the same parties, or any others standing in legal privity with them. (*Le Guen v. Gouverneur & Kemble*, 1 *Johns. Cas.*, 436).

7. It follows, from these positions, that the judgment in Connecticut is a perfect bar to the action brought upon the judgment of the Superior Court.

The judgment appealed from should therefore be affirmed.

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CUDLIPP *a.* WHIPPLE.

*New York Superior Court; Chambers, December, 1854.*

FORM OF COMPLAINTS.—SUFFICIENCY OF OLD FORMS.

A complaint to recover for money lent to, and paid, laid out and expended for, the defendant, at his request, is sufficient under the Code; though as general in its allegations of the particulars of the cause of action as the old form of a declaration in *indebitatus assumpsit*. If the defendant wishes a more detailed statement, his remedy is to demand in writing a copy of the account or the particulars of the cause of action.

Motion to require plaintiffs to amend complaint.

The plaintiffs brought this action as assignees of a demand which one James Whitney had against the defendant. The

facts in relation to the demand were stated thus in the complaint.

"The defendant was indebted to one James Whitney on the 3rd of November, 1853, in the sum of \$5046  $\frac{80}{100}$ , being a balance of account due from said defendant to said Whitney, on an account for money lent by said Whitney to said defendant, and for money paid, laid out and expended by said Whitney to and for the use of said defendant, and at his request."

The defendant moved that the plaintiff be compelled to make this part of the complaint more definite and certain.

*J. H. Harter*, for the motion.

*E. Terry*, opposed.

OAKLEY, C. J.—The Court of Appeals in *Allen v. Patterson*, (3 *Seld. R.* 476), decided that a complaint in an action to recover for goods sold, substantially in the old form of a declaration in *in debitatus assumpsit*, was good under the Code. There seems to be no distinction in principle between that case and this.

This action is brought to recover a balance alleged to be due upon an account for moneys loaned to and paid, laid out and expended for the defendant at his request.

Section 158 of the Code, expressly declares that it shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party within ten days after a demand thereof, in writing, *a copy of the account*.

This section has provided that a complaint in a case like this may be as general in its statements as the old *indebitatus assumpsit* counts. It also enables the adverse party to obtain a detailed statement of the particulars of the cause of action without an application to the court. He has only to demand in writing a copy of the account, and it must be furnished. The complaint in this case is therefore as specific and full in its allegations as the Code requires. If the defendant has any doubt as to the items in respect to which a recovery is sought,

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his remedy is to demand a copy of the account constituting the cause of action stated in the complaint.

The motion must therefore be denied.

(DUEE, CAMPBELL and BOSWORTH, J. J., concurred).

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## IN THE MATTER OF BROWN.

### LUNACY.—JURISDICTION.

*New York Superior Court; Special Term, December, 1854.*

The New York Superior Court will not take jurisdiction to issue a commission of lunacy.

The nature and extent of the power to take the persons and property of lunatics and habitual drunkards into judicial custody,—reviewed.

Application for a writ in the nature of a commission *de lunatico inquirendo*.

*P. Y. Cutler*, for petitioner.

HOFFMAN, J.—The question whether this court has jurisdiction to issue such a commission as is sought, and jurisdiction in a number of similar cases distinct from equity authority in an action, has been found to be so novel and unsettled that it has engaged the consideration of most of the judges.

The custody of lunatics was not vested in the English court of chancery as such. It was lodged in the crown. That branch of the prerogative might be exercised by any officer the king thought fit. It was ordinarily delegated to a great officer of state, but not necessarily to the Keeper of the Great Seal. A warrant under the sign manual was usually delivered to the lord chancellor or lord keeper upon his coming into office. (4 *Bro. Ch. Pr.*, 223; *Shelford on Lunacy*, 157). But the right of the crown to the management and control of lunatics and their estates did not commence until the finding of the office or inquisition of lunacy. (8 *Rep.*, 170 *b*). And the method of ascertaining whether the

party was a lunatic, was a petition to the lord chancellor, suggesting the lunacy, and verified by affidavits. He then issued a writ to the sheriff of the county where the party resided, to try by a jury, and personal examination, whether the suggestion was true or not. It was the ordinary writ upon a supposed forfeiture to the crown. (*Natura Brevium*, 581).

As rights accruing to the crown by forfeiture or other means were inquirable into by commission as well as writ, the former superseded the latter in practice. (*Ex parte Southcot, Ambler*, 111). Both issued under the great seal from the common law side of the Court of Chancery, and were returnable to that court. (*Ibid*).

In *Sherwood v. Sanderson*, (19 *Ves.*, 285), the lord chancellor says that the application is made to the lord chancellor, not as chancellor, but as the person having, under the especial warrant of the crown, the right to exercise the duty of the crown, to take care of those who cannot take care of themselves. The application has therefore no concern with anything passing in the Court of Chancery; but is made to the person holding the great seal in whom the crown has usually thought proper to vest this jurisdiction, as it would be made to any other person having that authority. (See also Lord Redesdale, *Ex parte Fitzgerald*, 2 *Sch. & Lef.* 435). Justice Story *Eq. Jur.* § 1364, *n.* sums up his view of the origin of the jurisdiction thus: "The truth seems to be that the lord chancellor acts merely as delegate of the crown, and exercising its personal prerogative as *parens patri* in chancery, and not as a court of equity."

And M. Fonblanque in his learned note upon Mr. Hargrave's observations, expressly considers the custody of lunatics as a delegation of a power conferred by parliament; noticing the fact that at common law the custody of lunatics and idiots, at least such as held lands, was not in the king, but in the lord of the fee. (2 *Fonblanque*, 230, *n.*) To some extent *at any rate* it is inaccurate to say that the custody of the estates of lunatics existed before the statute of Edward, and was independent of it. (*Ambler*, 707; 2 *John. Ch. R.* 237).

Upon our revolution, the people succeeded to the duties and prerogatives of the crown; and at a very early period they expressly delegated the authority in this matter to the chancellor. The successive statutes were substituted for the king's sign-manual to each lord chancellor or lord keeper. It is on this basis that the jurisdiction in our State is most clearly and safely vested, and the express delegation of the authority of the State as to the custody of the person and estate of lunatics, implied the right of judicially ascertaining who were such; and the course of proceeding almost necessarily followed that of the English chancery.

The statutes of Edward, ch. 9 and 10, afford the model on which our statutes have been framed. The first of these was the act of February 6, 1788, (2 *Greenl.*, 25), enacting that the chancellor should have the care and provide for the safe-keeping of all idiots, and of their lands and tenements, goods and chattels. (§ 1). The second section gives the care and custody of persons and estates of lunatics to the chancellor in like manner, and very nearly in the words of the statute of Edward.

The statute of the 10th March, 1801, embodied these two sections into one. Such was also the enactment in the revision of 1813. (1 *Rev. Laws*, 147, § 1). The Revised Statutes of 1830 adopt it, with slight change of language. (2 *Rev. Stat.* 52, § 1).

The circuit judges under the Constitution of 1822 and the Revised Statutes of 1830, were vested (in cases within their circuits) with all the original jurisdiction and powers which now are, or hereafter may be, vested in the chancellor in all causes and matters in equity, and in all causes or *matters of which the cognizance is or shall be vested in the chancellor, by virtue of any Statute.* (2 *Rev. Stat.* 108, § 2).

The act of 1831, appointing a vice chancellor, gave to him the same powers in the first Circuit, and under this act the vice chancellor issued commissions of lunacy. (3 *Edw. Rep.*, 380).

As it is admitted that the jurisdiction was not in the chancellor, by reason of his being the head of the Court of Chancery, it follows that the jurisdiction of the vice chancellor and

circuit judges was conferred by that clause of the act giving them power "in all causes or matters of which the cognizance is or shall be vested in the chancellor by virtue of any statute."

It results also, that the establishment of a court with general equity jurisdiction would not confer this particular power. This would also result from the general doctrine that a newly created court can have no other jurisdiction than such as is expressly conferred. A new court cannot prescribe. (4 *Just.*, 200).

The original jurisdiction of the Superior Court, conferred by the statute of 1828, and as varied or enlarged by any statute down to 1847, admittedly does not extend to such a case.

By the Constitution of 1846, (Art. VI. § 5), it was provided that the legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed; and by the 14th section inferior local courts of civil and criminal jurisdiction may be established by the legislature in cities. By the 12th section of article XIV. the Superior Court was to remain until otherwise directed by the legislature with its then existing powers and jurisdiction.

It is important, in order to determine the present question, to advert to the legislation in respect to habitual drunkards. The first act upon that subject was that of the 10th of March, 1821 entitled, "an Act concerning the estates of habitual drunkards." (*Laws of 1821, ch. 119*). It was declared to be lawful for the Court of Chancery of the State to exercise a jurisdiction and power in regard to the estates of persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, similar to the jurisdiction and power exercised by that court in regard to the estates of lunatics.

The second section provided that the overseers of the poor might make application to the chancellor for the exercise of such power. By the third, a mode of revising the action of the overseers by a jury before a justice of the peace was pointed out.

Under this statute, the court had no power over the person of the drunkard, but only over his estate. This was so held in



*Ex parte Lynch*, 5 *Paige*, 120. By the Revised Statutes the power of the court was extended to the person as well as the estate, and its authority was placed precisely upon the same footing as over lunatics and idiots. It was declared that the chancellor should have the custody of all idiots, lunatics, persons of unsound mind and habitual drunkards, and of their real and personal estate; and he was to provide for their safe keeping and maintenance out of their real and personal estates. (2 *Rev. Stats.*, 52, § 1). This statute, the chancellor observed, gave the court a perfect control over the person of an habitual drunkard, which it could exercise through a committee. (*Ibid*).

The statute of 1830 gave the like jurisdiction to the Court of Common Pleas of the County as to the chancellor, where the drunkard's property was less than \$250. In vacation, the application might be made to the first judge of the County. There was an appeal to the Court of Chancery. (2 *Rev. Stats.*, 52, § 3, 4, 5, 6). Other sections provided for the mode of obtaining a sale or mortgage of the real estate to satisfy debts. (§§ 11, 12, 13). This statute formed a complete and uniform system upon the whole subject, down to the 1st of March, 1846, when the third edition of the Revised Statutes was published. In defining the jurisdiction of the Court of Common Pleas, the Revised Statutes (2 *Rev. Stats.* 208), declared among other things, that they should have and exercise the power and jurisdiction conferred upon them by law, over the persons and estates of habitual drunkards.

Down to this period the Courts of Common Pleas had no jurisdiction as to lunatics, and a defined jurisdiction as to drunkards, nearly co-extensive with that of the chancellor, where the property was less than \$250.

The Constitution of November, 1846, (see Article 6, § 14), provided for the election of a county judge, who should hold the county court, and that the county court should have such jurisdiction in their county as the legislature should prescribe.

Then followed the Judiciary Act of May 12, 1847, and the 29th section of Article 4, provided that the county courts should have jurisdiction to hear and determine all matters and proceedings, especially conferred upon and heretofore

triable and cognizable by courts of common pleas of the several counties.

It appears to me that the power of the courts of common pleas as to drunkards, vested in the county courts by force of this provision.

Then in the 31st section it was provided that the said county court "should have equity jurisdiction in suits, and proceedings in the following cases," among them—"for the care and custody of lunatics and habitual drunkards residing in such county."

The clause as to drunkards was, as I view it, superfluous. What extent of jurisdiction was then given by the words as to lunatics? It is to be observed that it is a legislative grant of new jurisdiction to a tribunal of limited powers created by statute, and must be construed strictly. I apprehend it could not possibly be extended beyond the care and custody of the person.

The separation between the power over the person and over the estate, is strikingly shown by the case before Chancellor Walworth, in 5 *Paige*, 120, before noticed, where he held that the statute of 1821, only gave him power over the estate. And in England it is quite common to have separate committees, especially if the lunatic is a female; when the committee of the person is generally one of her own sex; and a male for the committee of the estate. (*Shelford*, 138, &c.)

The 21st section of the amended Judiciary Act of December, 1847, enacted that the Superior Court and Court of Common Pleas of the City and County of New York, shall respectively have and possess the same equity jurisdiction which is conferred upon the several county courts of the State by § 31, of the chapter referred to, (the Judiciary Act) or by any other act. See also the 22nd section.

At this period then the Superior Court may be considered as having jurisdiction as to the person, but none other.

The Code of April, 1848, provides first, That the courts enumerated (among them this court) shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this act. (Title I. § 10).

The 29th section of the same Code, repealed all statutes

then in force, defining or conferring the jurisdiction of the county courts so far as they conflicted with that act; and declared "that those courts should have no other jurisdiction than that provided in the next section." The 30th section then proceeded to enumerate the cases in which the county court should have jurisdiction, and among them is the authority as to idiots, lunatics, and drunkards.

But a marked distinction between the provisions of the Code and those of the act of 1847, must be noticed. The whole enactment of the latter was, that the county court should have equity jurisdiction "in a suit or proceeding for the care and custody of lunatics and habitual drunkards residing in such county." But in the Code the provisions are *first*, by subdivision 8 of section 30. "The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard residing within the county," and *next*, by subdivision 6. "The sale, mortgage, or other disposition of the real property, of an infant or a person of unsound mind, situated within the county."

The jurisdiction expressly conferred by the Code upon this court, does not include the power in question. The 33rd section read in connection with the 123rd, bestows jurisdiction in certain enumerated cases where the cause of action shall have arisen, or the subject of the action shall be situated within the county, and in the other cases specified, of personal residence or the service of a summons within the same. These actions are enumerated in prior subdivisions of section 123. Among them is an action for partition and for the foreclosure of a mortgage. But this express delegation of power is in actions, and relates to actions in the legal sense,—between contesting parties,—and as distinguished by the Code from special proceedings.

The legislature in this provision has selected two of the cases of equity proceedings from the 31st section of the act of 1847, and gives this court authority in those cases by express enactment. It omits the other cases, such as admeasurement of dower, sale of infants' estates, and the care of lunatics. The argument that this amounts to an implied exclusion of such cases is very strong.

The Court of Common Pleas was placed by the 33rd section of the Code in almost precisely the same situation as this court in regard to jurisdiction, expressly or by implication conferred. The judiciary act as amended, had placed each court in a similar position as to its authority in the present case. Yet it was deemed advisable or necessary to pass an act on the 12th of April, 1854, declaring that the Court of Common Pleas has power and jurisdiction of the following proceedings. To remit fines, &c.—and to exercise all the powers and jurisdiction now or hereafter conferred upon or vested in the said court, or in the county courts in their counties, and the powers and jurisdiction which were vested in the Court of Common Pleas for the City and County of New York, before the enactment of the Code of Procedure passed April 12, 1848.

By this express enactment all the jurisdiction given to county courts by the 30th section of the Code, is now vested in the Common Pleas. It is true the language of the act is a declaration that “the said court *has power and jurisdiction* to exercise all the authority,” &c.,—but even supposing the phraseology has been intentionally and technically used, it is too slight a ground on which to imply our own authority.

It is clear that if this court possess any jurisdiction, it could only be to issue the commission and appoint a committee of the person. We could do nothing as to the estate, and a very inadequate power would thus be vested in us.

The result of my examination is, that at least the point of jurisdiction is, even as to the person, so doubtful as to warrant our refusal to attempt its exercise in a matter where questions of title as well as other serious consequences may depend upon its existence, and when the most ample and sure relief is open in other tribunals.

Application denied.

GOËDEL *a.* ROBINSON.*New York Superior Court; Special Term, December, 1854.*

## UNVERIFIED ANSWER.—WHEN NOT STRICKEN OUT, AS SHAM.

Where neither complaint nor answer are verified, and the answer merely denies the allegations in the complaint, setting up no new matter, it cannot be stricken out as sham.

Motion to strike out an answer as sham, and for judgment as for want of answer.

— — — for plaintiff.

*Mr. Shannon*, for defendant.

HOFFMAN, J.—The complaint states, that the defendant made his promissory note, dated the 28th day of March, 1854, to his own order at six months, for \$696, and endorsed and delivered the same to the plaintiff; that the defendant has not paid the same nor any part thereof, but that there remains due \$696, with interest, for which sum the plaintiff demands judgment.

The defendant denies that at the time stated in the complaint, or at any other time, he made the promissory note described in such complaint, or that he endorsed any such note as is therein untruly alleged, or delivered the said or any note to the plaintiff; and denies that there is due from him to the plaintiff the sum demanded in the complaint.

The affidavits which are produced, are sufficiently positive to show that this denial of the answer is untrue. The clerk of the plaintiff swore positively that the plaintiff sold the defendant fifty-eight baskets of champagne, at \$12 a basket, on the 28th of March, 1854, and that the note in question was given for the price; that he called to get the note, when the bill was admitted and the note given.

The plaintiff swears to the same facts positively, and also to repeated promises of payment.

The question then is precisely brought up, whether an answer containing a plain mere denial amounting to the general issue, can be stricken out as sham.

In the case of *Caswell v. Bushnell*, (14 *Barb.* 395), the Supreme Court of this district at general term held that an answer cannot be stricken out as sham unless it sets up new matter; that under the old system the general issue, which was a mere negative, could not be treated as sham; citing *Broome County Bank v. Lewis*, (18 *Wend.* 500), that sham pleas were known before the Code was adopted, and had obtained a precise legal meaning applicable only to pleas of new matter, and that the phrase was used in that established sense in the Code. (1 *Chitty*, 576).

Although it may be noticed that the answer in this case was sworn to, and upon the general rule could not have been treated as sham, yet the court pursuing the reasoning at the special term, expressly place the decision upon the ground stated, and have made it a settled rule in this district.

In *Winne v. Sickles*, (9 *Pr. R.*, 217), Justice Harris applied this doctrine in its utmost extent, in a case almost as strong as the present, upon the affidavits, distinctly holding that an unverified answer could not be stricken out as sham when it contained nothing but a general and full denial of the matters of the complaint.

The same learned judge had stated the rule to the like effect in *White v. Bennett*, (7 *How. Pr. R.*, 59), and in *Livingston v. Finkle*. (8 *How. Pr. R.*, 486).

On the other side, Justice Barculo, in *Nichols v. Jones*, (6 *How. Pr. R.*, 356), held that the true rule under the Code was to strike out all answers or defences as sham when they appear to be clearly false, whether they appear to be good in point of law on their face or not. He then proceeds to say:—"The difficulty is in determining what shall be deemed conclusive evidence of the falsity of a pleading: and I suppose the falsity must be admitted or clearly established. It may be so plain and palpable as to admit of indisputable proofs, as where it appears by the affidavit of the plaintiff and is not denied by affidavits on behalf of the defendant. If, however, in the latter case the defendant comes forward in reply to the motion

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and swears to the truth of his answer, it cannot be stricken out: for the court will not determine the question upon a balance of testimony. The evidence of the falsity must be clear and undisputed."

In *Conklin v. Vandervoort*, (7 *How. Pr. R.*, 688), Justice Marvin held that under the Code an unverified answer, consisting of denials only, might be stricken out as false, as well as where it sets up new matters by way of defence.

I have also again examined the case of *Miner v. Cartledge*, (8 *Barbour*, 75), so much criticised in all the discussions upon this subject.

It will be perceived from this statement of the cases that judges of eminent qualifications have greatly differed upon this point. The weight of authority, especially that of the general term in this district, preponderates in favor of the rule which restricts the striking out of an answer on the ground of its falsity, to answers containing new matter. The court is of opinion that this rule is best supported by the doctrine which prevailed before the Code and by a sound construction of the Code. The plaintiff has always the power of swearing to his own statements, to put the defendant to an answer under oath, when he may not be able to meet averments by express denials. If he waive this privilege, he must be treated as waiving the right to have his cause heard upon affidavits.

Motion denied without costs.

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CURTIS a. LEAVITT.

*Supreme Court, First District; General Term, December, 1854.*

STAY OF PROCEEDINGS.—TAXATION OF COSTS.—SUITS COMMENCED BEFORE THE CODE.

Taxation of costs and the insertion of their amount in the entry of judgment, are not stayed by an appeal with security.

The old chancery fee bill has not been repealed by the Code. It is still in force; but is only applicable to proceedings had prior to July, 1851, in equity suits commenced before the Code.

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Curtis *v.* Leavitt.

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*Held*, in an equity suit commenced before the Code, that costs of all proceedings prior to July, 1851, must be taxed according to the fee bill; those of all subsequent proceedings according to the Code.

### Application for taxation of costs.

The facts are sufficiently stated in the opinion.

MITCHELL, J.—The decree or judgment of this court was rendered on the 31st of December last, sustaining the trusts in the cause, and adverse to the claims of the receiver. It directed, in substance, that “the taxable costs” of the trustees, and of the receiver and of other parties, together with the amounts secured by the trust deeds, be paid out of the funds in the hands of Mr. Palmer, a special receiver in these actions; and if these were not sufficient, next out of the funds in the hands of Mr. Leavitt, so far as those funds were covered by the trust deed and were necessary for that purpose. The bills were filed in 1842, and answers put in and testimony taken and closed in December, 1850. The pleadings and proofs were all in writing, and constituted several large volumes of printed matter. The cause was called for hearing in April, 1851, before Mr. Justice King, at special term, but was directed by him, pursuant to the Judiciary Act, to be first heard at general term; and it was so heard on the pleadings and proofs in 1852. The trustees applied to one of the justices of this court to tax their costs, when the counsel for the receiver objected that the taxation should be under the Code; and the justice referred the matter to the general term for directions. The receiver now also objects to the taxation, on the ground that he has appealed from the decree and given security in \$250, which he insists is a stay of all proceedings, and especially to prevent any payment of moneys under the decree. The trustees contend that the appeal is no stay, unless there be security for the payment of whatever sum the appellant may be decreed to pay.

The only questions now necessary to be decided are, whether an appeal with security in \$250 stays the taxation of costs, and by what system the costs are to be taxed.

Assuming the view of section 459 of the Code, that the



judgment in these actions is to be entered according to the Code, although the action was commenced before the Code, then, according to section 311, the clerk is to insert in the entry of the judgment the amount of the costs payable to any party; and the judgment would not be complete without such entry. At common law, also, the amount of the costs to the prevailing party formed a proper part of a complete judgment. In equity, also, the same practice prevailed before 1830, and then the only change was to annex the whole bill of costs to the decree, instead of stating the total in the decree. The Code (§ 311), adopts the common law practice. All, then, that the trustees now propose to do is to perfect their judgment, not to execute it. Section 335 prevents an appeal on a judgment directing the payment of money from staying the execution of the judgment, unless security be given in the amount therein required; and section 342, allows such an undertaking as was given in this case to "stay proceedings in the court below upon the judgment appealed from." Proceedings upon the judgment are those which are in some way to carry out or enforce the judgment, as an execution on a judgment for the payment of money, or a sale on a decree of foreclosure and sale, or process for contempt, or other coercive measures, on a judgment to deliver documents or property, or to execute a conveyance. These modes of "proceeding upon a judgment" are specified in sections 335-6-7-8, and illustrate the meaning of the general phrase afterwards used in sections 339 and 342, and show that it is to be construed by reference to those illustrations, and in analogy with them. The taxation or adjustment of costs not being an execution of or proceeding upon the judgment, but a means of completing it, is not stayed by the appeal.

The other question is as to the rule of taxing costs. To understand some of the decisions on that subject more clearly, it may be proper to notice the legislation on which they were founded. The revised statutes prescribed the law as to costs both at law and in chancery, and continued to control as to the amount of costs in suits at law until 1840, when a new system of costs in such suits was adopted. The general principle of the new system was to pay for a particular service a

certain sum, whether it took much or little writing to perform it. The new act was not merely inconsistent with the old in cases to which it applied, but it expressly repealed sections 17, 18, 19, 22, 27, 31 and 32 of the revised statutes as to costs. These sections related to costs of attorneys and counsel in the supreme court and common pleas, and of the clerks and criers in those courts, (Laws of 1840, ch. 386, § 40, and 2 Rev. Stats. 632, § 17, &c). It however provided by § 38, that the act should not affect any suit or proceeding commenced before that act took effect. This saving section was repealed in 1844, (Laws of 1844, ch. 104, § 8), so that after that time the law of 1840 was to apply even to suits commenced before 1840. At common law, and without some statute, a successful party had no right to costs. If therefore, in any case a successful party will claim costs, he must point out some statute in force, and not repealed, which gives them to him. He cannot claim them under a repealed statute, for that has ceased to exist; and he is left, therefore, to claim them under some statute in force when the judgment is rendered. Accordingly, under the joint effect of the acts of 1840-'44, costs could not be taxed under the system of the Revised Statutes if the judgment was obtained before the act of 1844 took effect, except perhaps as between attorney and client. (*Brooklyn Bank v. Willoughby*, 1 *Sand.* 669). When the Revised Statutes were adopted they repealed the previous statutes as to costs on the same subject, (sub. 90 of § 1, 3 *Rev. Stats.*) but declared that such repeal should not affect suits commenced in any civil cause previous to the repeal taking effect—(*ibid.* p. 155, § 5). That left two systems in force, and it is believed that each was applied as to old suits so far as the services had been rendered under them. Before the Revised Statutes, costs on appeal in certain cases, from a justice's court to the county court, were in the discretion of the court—but the Revised Statutes gave the appellant full costs if he reduced the judgment against him \$10; and the supreme court held, although the appeal was made before the Revised Statutes took effect, that the former statutes were repealed, and that there was then no law regulating the costs in cases of that kind but what was to be found in the Revised Statutes, which, therefore, must govern. (*People ex. rel. Berry*

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*v. Herkimer County Common Pleas, 4 Wend., 210*). This put the decision on the ground that no other law as to costs but the new one was then in force. A like decision on the same principle was made in the *Supervisors of Onondaga v. Briggs, (3 Denio, 173)*, under the acts of 1840—44. And the court held that even in suits commenced before the act of 1840, if judgment were obtained after the act of 1844 took effect, all the costs were to be taxed under the act of 1844—but on the ground that the previous acts as to costs have been repealed, and so became totally extinct. The court said—"When the 30th section of the act of 1840 came to be repealed by the act of 1844, all the provisions of the Revised Statutes regulating the compensation of counsellors and attorneys in this court became extinct," and that besides the two acts of 1840 and 1844, there was no other act in force when the suit was terminated, or when the costs were taxed, bearing upon the subject. (*Ibid.* 175, 176).

This case is different. These were equity suits, commenced before the Code took effect, and the Revised Statutes, as to the costs in such suits, remain to this day unrepealed, notwithstanding all the amendments of the laws; they were not touched by the acts of 1840 and 1844, and there never has been any act expressly repealing them. They, therefore, may stand along with the Code, and have generally been supposed still so to stand and to have equal force where the services were rendered under them. Section 459 of the Code, as amended in 1851, does not by implication repeal them. It makes the provisions of the Code "apply to future proceedings in actions theretofore commenced, as follows when an issue of law or fact was to be tried, then the trial and all subsequent proceedings, and after judgment to the proceedings to enforce, vacate, modify, or reverse it, including the costs of an appeal." By its very terms it was to apply only to the future proceedings in the cause. The bills of complaint drawn and served in these cases, and the answers and replies also drawn and served, and the testimony then taken, and the order closing the proofs, all constituted parts of the past, (and not of the future,) proceedings in the cause when the act of 1851 was passed. These services, too, were all rendered under a reasonable expectation

that they were to be paid for under the laws then in force. These laws do remain still in force, and have no application unless it be to cases when actions were commenced (as this was) before the Code took effect, and the costs had not yet been taxed, nor judgment rendered. They cannot be said to have been allowed to remain for cases where judgment had been rendered, but costs not yet taxed; for after judgment the rights of the parties would be fixed as on a contract, and the subsequent repeal of the law could not affect such rights. It is also entirely contrary to the prevailing policy of the legislature to allow a law to retrospect, even where it does not impair a contract. Accordingly, the Code, by express terms, was not to apply to these existing suits, except in the first part of it, which relates only to the powers of the courts, (§ 8). The statute of limitations adopted in it was made to apply only to future actions and causes of action, although such statutes affect the remedy only. The title of the Code relating to costs was included in the part which was not to apply to existing actions; and while other sections were, by the supplementary act of 1849, made applicable to old suits, this title as to costs was excluded from that act, except section 315, as to costs on motion. This shows a deliberate purpose on the part of the legislature to save the right of costs for services already rendered, as they would a like right under an express contract. Such a clear purpose, so consonant to justice, ought not to be defeated on a supposed implication. Section 303 was quoted as repealing all the old fee bills; but it must be taken with the qualification contained in section 308, which expressly permits its application to existing suits, and then it will only read that the old fee bills are repealed as to future suits, and leave them in force as to old suits. Then section 459 may apply the new system of costs to such part of the proceedings as should be had after that section took effect. This makes all consistent and just. The principle of the Code, as expressly declared, leads to the same result; it declares in the same section that costs are allowed to the prevailing party *by way of indemnity*. If, as the counsel for the receiver argues, and as the decision of the Superior Court sanctions, the old bill is to prevail, as between attorney and client, the indemnity to the client can

only be by allowing him what the law compels him to pay to his attorney.

The result is that the Code, as originally enacted, did not repeal the old fee bill as to suits previously existing; and that although section 303 of the Code, as first enacted in terms, repealed the old fee bill, yet, by prior sections of the Code, that repeal applied only to future suits—thus, before section 459 was enacted, the old fee bill was in force as to old suits, and the new fee bill under the Code as to new suits, and services were rendered with a fair understanding that they were to be paid for under the old system; that this new section was added, applying the Code to all future proceedings in the old suits. The effect of this on section 303 was, that after this, the old fee bill was repealed as to all future proceedings, but in force as to all past proceedings. It can hardly be questioned that those who adopted this section meant it to apply only to the mode of future proceedings in such suits, and did not mean to disturb anything that had even the seeming of a pre-existing right; otherwise they would not have been so careful to confine the effect of the section to future proceedings, and to include, by express terms, costs in appeal, and leave them out in other cases. This shows that they did not intend that past costs should be included in the general term (future proceedings) before used.

The whole question, perhaps, turns more properly on the meaning of the decree than of the Code—that gives taxable costs, expenses and counsel fees. The costs intended must be such as would cover all the expenses of the party, legitimately incurred in the suit, and those would include for the attorney whatever might have been fairly taxed to him, as the services were rendered and the suit progressed. The taxing officer should proceed and tax the costs on the principles above stated, taxing all costs prior to July, 1851, under the Chancery fee bill, and all subsequent costs under the Code.\*

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\* Upon this subject, see also the case of *Vernon a. Mc Masters post*.

ALLAIRE *v.* LEE.*New York Superior Court; Chambers, December, 1854.*ALLOWANCE.—WHAT CONSTITUTES A TRIAL.

When a plaintiff voluntarily submits to a nonsuit after evidence has been given on both sides, and while the defendant's counsel is summing up, it cannot be objected to an application by the defendants for an allowance, under § 308 of the Code, that a trial has not been had.

Motion for an allowance.

After the evidence in the action had been closed, and while the defendant's counsel was addressing the jury, the plaintiff's counsel proposed to submit to a nonsuit, and was nonsuited. The defendants moved for an allowance under § 308 of the Code. It was objected that no trial had been had.

OAKLEY, C. J.—This is a proper case for making an allowance, unless the objection made to it, was well taken. The defendants have recovered a judgment. A regular trial was had, witnesses were examined by both parties, and after the evidence was closed, the plaintiff was nonsuited. If he had been nonsuited on the defendant's motion, without any attempt on the part of their counsel to address the jury, no one, I presume, would doubt that a trial had been had. What took place, was none the less a trial, because the nonsuit was voluntarily submitted to, before the defendant's counsel had concluded the address he was intending to make to the jury. I think the case too clear to need illustration or argument. A proper allowance will therefore be made.

(The other justices to whom the point was stated, concurred).

THURSTON *a.* KING.*Supreme Court, First District; Special Term, December, 1854.*

## SHERIFF'S CERTIFICATE.—ISSUING OF EXECUTION.

The official certificate of a sheriff of another State is not evidence in this State of service of papers; his affidavit should be presented.

Execution cannot issue upon a judgment after the death of the judgment creditor. The remedy of the executor, is properly to be sought by original action.

Application for an order that execution issue.

The facts sufficiently appear in the opinion.

MITCHELL, J.—Application is made for an absolute order that execution issue upon the judgment in this action. The plaintiff's attorney showed that five years had elapsed since the entry of the judgment, and made affidavit that the judgment remained due, and that the defendant was, and resided, in Hamilton County, Ohio. On this proof he obtained an order for the defendant to show cause why execution should not issue, and that the notice be served on the defendant by publication for six weeks in one newspaper, and by service on him by the sheriff of Hamilton County, *Ohio*. He now produces proof of such publication, and a certificate of the sheriff of that county of the personal service of the notice. (Code, § 284).

The certificate of a sheriff in our own State is proof, because he is acting under his official oath. But a sheriff of a county in Ohio, when he serves process or notices from our State, does it, not by virtue of his oath of office, but as a private individual; his oath relates only to what he does under the laws of his own State. He should therefore make his affidavit of service.

The papers however show that the plaintiff is dead, and that his attorney who is acting on this application, is his executor. Before the Code an execution could not issue after the death of the plaintiff unless he died within the last term or vacation;

but it was necessary for a *scire facias* to issue to revive the judgment and authorize execution on it. The Code, while it prevents an action from abating by death during its pendency, (§ 121) does not allow it to proceed in the name of the decedent any more than the old law did, but allows it to be continued by motion or supplemental complaint by or against his representatives. As the writ of *scire facias* is abolished, that ancient remedy can no longer be resorted to. But the same section which abolishes it, with certain other writs, declares that "the remedies heretofore obtained in those forms may be obtained by civil action under the provisions of that chapter." (§ 428). Thus it was intended that no relief should be lost, but that the mode of obtaining it only should be changed, and that that mode should be by action. From the language used,—"by civil action *under the provisions of this chapter*,"—it would be supposed that special provision could be found in that chapter for every case where relief had before been obtained by *scire facias*. But that is not so, and the only cases specially provided for are usurpations of franchises. And as *scire facias* was one mode of testing a right to franchise and *quo warranto*, and information in nature of a *quo warranto*, were others, and this section abolishes all three of these ancient remedies, there is room for argument that the only *scire facias* intended to be abolished was that which was of the same nature with the two other writs, and for which this chapter specially provides. This, however, is contrary to the general understanding, and to the object of the Code in getting rid of the old system, and to the broad language used in this section. (*Cameron v. Young*, 6 *How. Pr. R.*, 372).

The plaintiff's only remedy is by original action, or perhaps under a liberal interpretation of section 121, by motion or supplemental complaint. The safest mode would be by action, and as "the remedies heretofore obtained in the form of *scire facias*, &c., may be obtained by civil action," (Code, § 428), the executors of the plaintiff would be entitled to ask for and to obtain an execution to be issued in their names, to be levied of any lands which the defendant held when the judgment was docketed.

The present application is denied.



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The People, upon the Relation of Jenkins *a.* The Parker Vein Coal Company.

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THE PEOPLE, upon the relation of JENKINS *a.* THE PARKER  
VEIN COAL COMPANY.

*Supreme Court, First District; General Term, December, 1854.*

MANDAMUS.—TRANSFERS OF STOCK.

A mandamus will not be granted, to compel a moneyed corporation to make transfers of stock.

This writ is only allowed for the purpose of enforcing a public duty owed to the State in which it issues.

Application for a mandamus.

The facts on which the application was based appear sufficiently in the opinion of Mr. Justice Mitchell.

MITCHELL, J.—The complainants show that they own stock in the Parker Vein Coal Company, and have sold shares of it held by them, and bought other shares, and that the Company refuses to allow them to transfer the shares on the books of the Company. The complainants applied at special term for a mandamus to compel the Company to allow the transfer in both cases. The motion was denied, and they appeal.

A similar application in *Shipley a. The Mechanics' Bank*, (10 *Johns. R.*, 484), in the year 1813, and denied. The court said that the applicants had an adequate remedy by an action on the case,—that it was not a matter of public concern, and there could be no necessity of possessing the identical property, as in the case of a favorite chattel, *pretium affectionis*,—and that by recovering the market value of the shares, they could be replaced. These are all good reasons, and equally applicable to this case. The same decision was again made in 1843, in the matter of the Firemen's Insurance Co. *a.* The Commercial Bank of Albany, (6 *Hill*, 243), and on the ground that when a corporation improperly refuses to transfer stock, the party injured has an ample, though not a special remedy by action. When the applicant has such remedy, and is a private person, he is left to that relief, unless he claim a right to exercise an office, perform a public service, or exercise a

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franchise, or the defendant holds a public office and neglects to perform a duty prescribed by law, and which is imposed for the public benefit, and is not a mere private right. Of the last class was the case of the People *v.* Shile, (2 *Barb. S. C. R.*, 397; and see the remarks of Lord Mansfield as quoted by Judge Edmonds there, at p. 417).

The case of Kortwright *v.* The Buffalo Commercial Bank, (20 *Wend.*, 91, *aff'd* 22 *Wend.*, 348), and of Pollock *v.* The National Bank, (3 *Seld.*, 274), show that the remedy by action is effectual and readily obtained.

It is said that the action will be only a sort of suicide, as the stockholders would be suing themselves. The fact that the applicants own other stock cannot be a foundation for giving them a remedy refused to all other parties whose stock the company will not transfer. If, as suggested, the company is insolvent, the applicants will be better off in a suit where they recover damages and hold the judgment as creditors, than if they compelled a transfer of the stock, and so were to be postponed to all creditors. If the company is solvent, the damages which they will recover, will be a full compensation for all the injury which they sustain by loss of the stock.

There is also another difficulty in this application. The mandamus partakes of the character of a *public writ*—one in which the people are somewhat interested,—and it has never been allowed except for the purpose of controlling those who owe a public duty to the State in which it issues. This Company is incorporated in Maryland, and although it has an officer here, and may be sued here on its contracts and obligations to individuals or others, yet it does not owe *allegiance* or *public* duties to this State, or according to the laws of this State, but to the State of Maryland according to the laws of that State. If it violates its charter, the remedy should be in Maryland and not here. On *quo warranto*, its charter could not be taken away here—and while it does not violate any law of our State, the State should not interfere with it.

The order appealed from is affirmed with costs.

MORRIS, J.—In an elaborate opinion based upon the merits of the application and not discussing the question of practice involved, concurred in refusing the writ.

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De Agreda a. Mantel.—Mantel a. Guynet.

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DE AGREDA a. MANTEL.—MANTEL a. GUYNET.

*New York Superior Court; Special Term, December, 1854.*  
*(Original and cross actions).*

JUDGMENT UPON APPEAL.—DOCKETING.—PROCEDURE IN CASE OF  
 DEATH OF PARTY.—LIABILITY OF REPRESENTATIVES.

The proper form of judgment of affirmance upon appeal from the special to the general term, defined.

Application to correct the form of a judgment of the general term may be made at special term.

The test of the right to docket a judgment is the right to issue execution upon it immediately.

Judgment upon appeal cannot be rendered as of a day subsequent to the death of a party appellant or respondent.

But it may be rendered as of a day prior to his decease.

Except that a day cannot be selected for this purpose, upon which the court of appeal could not have been in session, or the appeal could not have been heard.

Where there is a joint contract or liability and one party is dead, the other only should be sued.

Where the contract or liability is joint and several, the representatives of the deceased are necessary parties.

The several modes by which the representatives of a deceased party in interest to an obligation of the latter class may be made parties to a suit upon it pending at the time of his death—pointed out.

The personal representatives may be sued as soon as they have taken out letters.

*It seems*, that heirs may in such a case be made parties immediately on the decease of their ancestor, for the mere purpose of enabling them to look to the title of real estate, and protect eventual interests which they might have in the personality.

Order to show cause why plaintiff in the cross action, who was defendant in the original action, should not have certain relief.

*E. H. Owen* supported the order.

*J. B. Stevens* showed cause.

HOFFMAN, J.—The application in this case is attended with considerable difficulty. The questions arise under an order for John B. Mantel to show cause why the judgment or decree settled on the 12th day of July, 1854, should not be filed with

the clerk of the court, and why the judgment on the affirmance of such judgment should not be settled by one of the justices, and so amended and corrected as to confirm the same to the decision of this court on the determination of the appeal; and why the docket of such original judgment and also the docket of such judgment of affirmance in the clerk's office of the city of New York should not be vacated; and why the heirs or representatives of the said George Guynet should not be made parties to these actions; and why all proceedings in these actions on the part of the said John B. Mantel should not be stayed until the said heirs and representatives of the said George Guynet are brought in as parties thereto; or why the said Joseph S. de Agreda should not have such other or further relief as he may be entitled to.

All proceedings in the interim were stayed by this order to show cause.

The facts out of which the questions arise are as follows:

Joseph S. de Agreda and George Guynet, plaintiffs in the first action, were purchasers from Mantel of the premises in question, and sought a recession of the contract of sale. Mantel, plaintiff in the second or cross action, sought to have it enforced. The cause was sent to a referee to hear and decide.

A judgment was entered on the 12th day of July, 1854, founded upon the report of the referee. It was entered in both suits, and adjudged that the contract of sale and purchase mentioned in the pleadings was binding, and should be carried into effect, and that therefore the relief asked in the complaint in the original action (the first above mentioned) should be dismissed.

The judgment entered upon the report of the referee was in substance as follows:

Guynet and De Agreda were ordered to accept the deed of the premises, to pay the sum of \$15,054 94, and to execute a mortgage for the balance of the purchase money and pay the costs within fifteen days.

The decree then proceeded, that in case of default of such performance, then the parties were to pay to Mantel the said sum of \$15,000, and also the further sum of \$30,000, being the balance of the said purchase money, which by the contract

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was to have been secured by such bond and mortgage, with interest from the 2d day of May, 1853, to the date of the decision, amounting to the sum of \$31,890, which several sums amount in the aggregate to the sum of \$49,044 95, with interest thereon and costs, and in default thereof that the premises mentioned in the contract be sold at the Merchants' Exchange under the direction of, &c.

Then follow provisions as to the mode of making and consummating such sale—directions for the payment of the said sum of money out of the proceeds—and deposit of the surplus, if any, with the clerk of the court, and also if there should be a deficiency, that the same should be specified in the report of sale, and Mantel have execution therefor according to the practice of the court.

In November, 1854, the judgment was affirmed by the general term, and the judgment then entered was in substance as follows: That the causes were brought to a hearing as original and cross actions upon the appeal of the said George Guynet and Joseph S. de Agreda, taken to the general term from the decree made on the 12th day of July, 1854, whereby it was ordered and adjudged, among other things, that the respondent recover against the appellants the sum of \$49,054 95, with interest from the 10th of June, 1854, together with costs and allowance, taxed and adjusted at the sum of \$490 05. That after hearing counsel, &c., it was ordered and adjudged that the judgment and decree so appealed from, be in all respects affirmed with costs; and that the appellants do pay respondent the sum of \$51,135, being the aggregate amount of the aforesaid several sums with interest thereon to the date of the decree, together with costs of the respondent upon the appeal, adjusted at \$122 07, amounting in the whole to the sum of \$51,251 14, and that the respondents have execution therefor according to law.

Each of these judgments has been docketed in the clerk's office of the county of New York, the one on the 12th of July, 1854, for \$49,535; the other on the 24th of November of that year, for \$51,259 14.

Guynet, one of the plaintiffs in the original, and a defendant in the cross action, was on board the Arctic, which was

destroyed on the 27th of September, 1854, and that date may, for the present questions, be taken as the day of his death.

The judgment entered on the report of the referee was entered on the 14th of July, and an appeal was taken on behalf of both defendants on the 19th of that month. On the 8th of August an order was made staying all proceedings on the part of Mantel, upon Guynet and De Agreda giving security in the sum of \$10,000. The appeal was noticed for hearing for October term, 1854, which commenced on the 2d of that month. It was again noticed for the November term, and was decided, and judgment entered on the 18th of that month.

No suggestion was made of the probable death of Guynet until the twenty-second (22) of November, when his former attorney gave notice of the fact of his having been in the Arctic, and that he was presumed to be dead.

Upon these facts several important, and to some extent novel questions have arisen.

1st. As to the first branch of the application, it is shown that the judgment was duly filed, and the attorney of De Agreda was in this instance mistaken.

2d. I consider that the form of the judgment of affirmance at the general term was incorrect. Although an execution would no doubt be restrained to the single amount due, yet there appears upon the record two judgments for the same sum, one a little increased by interest and costs, and this I think is at least irregular. The objection to it strikingly appears, when we notice that here are two docketed judgments for double the actual debt, embarrassing the record and prejudicing the party.

The course pointed out by Justice Barculo in *Eno v. Crooke* (6 *How. Pr. R.*, 402), is, I apprehend, the regular practice. He shows the distinction between an appeal from an inferior to a superior tribunal, and one from the special to the general term of the same court. In the latter case it is simply declared that the court is satisfied to let the judgment stand.

The judgment pronounced at general term should therefore have been merely this: That the causes having been brought to a hearing as original and cross actions upon the appeal of the said George Guynet and Joseph S. de Agreda to the gene-

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ral term of this court taken from the judgment made and entered therein on the 12th day of July, 1854, thereupon on hearing of counsel, &c. It is ordered and adjudged that such appeal be dismissed, and such judgment be affirmed with costs, and that the said John B. Mantel, the respondent, do recover and have execution for such costs when adjusted by the clerk, and inserted in the entry of this judgment.

It follows from this view, that the second docket of the judgment, as to every thing at any rate, except the costs, must be vacated. Whether it can stand for that sum will be afterwards noticed.

Thus far I see little difficulty. The original judgment was duly entered. The judgment of affirmance should be amended, and the docket in whole or in part vacated.

The application for this amendment can be made at the special as well as the general term. (*Ayres v. Colville*, 9 *How. Pr. R.*, 573 ; *Corning v. Powers*, *Ibid.*, 54).

8d. Upon the next and a material question, I am of opinion that such a judgment as has been here made cannot be docketed at all. There can be no docket except for the deficiency, when that shall be ascertained.

Before the Revised Statutes, a judgment was a lien upon lands from the time of its entry, although it did not affect them as against purchasers, until a docket (1 *Rev. Stats.*, p. 501), and decrees in the court of chancery affected personal property, from the time of levy upon an execution, and real estate from seizure under the same. The Revised Statutes provided that a docket should affect lands under decrees from its date. (2 *Rev. Stats.*, 360 ; *Norton v. Talmadge*, 3 *Edw. R.*, 310).

The docket was at first a mere alphabetical record of judgments, made by the clerk of the court. By the statute of 1840, (*ch.* 386, § 25), no judgment or decree could be a lien upon lands, unless it was docketed in the office of the clerk of the county in which the lands were situated. Assistant Vice-Chancellor Sandford held, that under this act, lands could still be sold by execution out of this court, where they were situated in the county of New York, although the judgment was not docketed. (*Wheeler v. Hemans*, 3 *Sand. C. R.*, 597). As to personal property no docket was ever necessary.

It deserves consideration, however, whether an execution can be issued under the Code, even as to personal property, unless the judgment is docketed. The sections 283 and 287, taken together, provide, that writs of execution for the enforcement of a judgment, are to be issued as prescribed by the title; and that an execution against the property must be issued to the sheriff of the county when the judgment is docketed. To what sheriff can it be issued if there is no docket in any county?

In *Stoutenbergh v. Vandenberg*, (7 *How. Pr. R.*, 233), the court consider, that by the true construction of the Code, a docket is in all cases necessary.

The 282d section of the Code provides, that upon filing a judgment roll upon a judgment *directing in whole or in part the payment of money*, it may be docketed with the clerk of the county where it was rendered, and in any other county, upon filing a transcript, &c.

The second subdivision of the 16th section of the Revised Statutes (2 *Rev. Stats.*, 361), shows, that a docket could only be had when a decree is for a fixed amount of debt, damages, costs, or other sum of money.

In the cases of *Crewley v. Graham*, (8 *Paige*, 480), and *The Bank of Rochester v. Emerson*, (10 *Paige*, 116), the practice of inserting a direction to pay a deficiency, and that the party have execution in mortgage cases, is recognized; but also that no execution could issue until report and confirmation.

In *Cobb v. Thornton*, (8 *How. Pr. R.*, 66), Justice Marvin held, that the Revised Statutes respecting the foreclosure of mortgages were still in force. He refers to the preceding cases, and to the rule, that although a conditional provision for payment of the deficiency is inserted in the decree, no execution can issue until the sale settles the amount of the deficiency and a report has been made.

It appears to me, that a test of a right to docket a judgment, is a right to issue an execution upon it immediately. None can be issued in this case until the sale has taken place. In the interim the plaintiff Mantel has the security of the property, and that of the undertaking given upon the appeal.



4th. The next question relates to the abatement of the action.

The cases which bear upon this subject are, *Rogers v. Paterson*, (4 *Paige*, 409), *The Bank of the United States v. Weisenger*, (2 *Peters*, 481), and *Vroom v. Ditmas*, (5 *Paige*, 528), and they settled, that where an appeal had been taken and the complainant died after it was in readiness for hearing, but before argument, the order upon the appeal might be entered *nunc pro tunc* as of a day previous to the death. In *Rogers v. Paterson*, the decree in the court of errors was made and dated as of a day after the party's death, and was considered to be valid by the chancellor, he adding, however, that if it was error, the court above could alone correct it. See also the case of *Bogardus v. Trinity Church*, 28th October, 1833, (1 *Hoffman's Ch. Pr.*, 390).

The chancellor in *Rogers v. Paterson* cites however much authority to prove that it is not essential to revive a cause in the Court of Errors where death occurs after an appeal or writ of error is perfected. And in *Hastings v. McKinley* (8 *How. Pr. R.*, 175), the Court of Appeals appears to approve of this practice. In *Miller v. Green* (7 *How. Pr. R.*, 159), Justice Harris treats it as settled practice on an appeal from the special to the general term of the Supreme Court; and in that case the party, appellant and defendant, died before argument of the appeal, but after it was perfected. The case is precisely like the present. The judgment was ordered to be entered as of a day anterior to his death.

See also as to the course in the House of Lords, *Thorpe v. Malingley* (1 *Phillips Rep.*, 200).

So Justice Wells in *Holmes v. Honie* (8 *How. Pr. R.*, 384), observes, that it was never regular either by common law or statute to enter a judgment against a person after his death; and he notices the practice of entering where judgment *nisi* had been had, and a final judgment had been delayed by a case or bill of exceptions; but that in such and similar cases the judgment was ordered to be entered of a day when the party was living, so that the record would show that fact. See also *Crawford v. Wilson* (4 *Barb.*, 523).

Such a judgment then might in ordinary cases be entered

upon an appeal like the present. But in this case a great difficulty arises from special circumstances.

The Code authorizes the court to appoint general and special terms (§ 34.) The court appointed such by rule for the first Monday of every month, except July, August, and September; and ordered that at the conclusion of June term the court would appoint general terms, for the hearing of appeals from orders made on non-enumerated motions only, to be held during the vacation. This was done in June last, and a general term appointed for the 31st of August and the 30th of September. The 31st of August was then the only general term, after the appeal in this case, and before the party's death. But the appeal could not have been then heard except by consent.

Hence, if the position cannot be supported, that the judgment on the appeal was not erroneous, although entered on the 18th of November after the party's death, (that to remain as its actual date), such judgment was irregular, and the case as to Guynet must be treated as it stood on the 8th day of August when the appeal was perfected.

I have concluded that this would be irregular, if not void. In a tribunal of ultimate resort, on the final decision of a cause, it may be warrantable. But the theory of an appeal from a judgment at special term (and this is the same) to the general term, is a rehearing in the same court before other or additional judges. And then it would appear that judgment is given by the court as of a day when it could not have been in session to make such a judgment.

It remains to consider what on this basis are the rights of the parties.

The Code in terms declares that no action shall abate by the death, marriage, or other disability of a party, if the cause of action survive or continue (§121). In effect this is an adoption of the chancery interpretation of abatement—that it is merely an interruption of the suit, suspending proceedings in whole or in part, according to the circumstances of each case, and the position of the deceased party on the record. (*Hoxie v. Carr*, *Sumner's Rep.*, 173).

The case must then be taken up, as it stood after the appeal

was perfected, and as if no affirmance had been had at the general term as to Guynet and his rights.

The counsel for the plaintiff Mantel here raises the point, that no proceedings by way of revivor or otherwise (except a suggestion on the record of the death) are requisite—that the whole cause of action has survived as against De Agreda, and that the judgment may be fully executed by a sale of the whole property, and all the interests of each party therein, without any regard to the heirs or executors of Guynet.

Let the case be considered just as if the plaintiff Mantel had brought his action to enforce the contract after Guynet's death. Who ought then to have been made parties?

The following authorities establish that in general where there is a joint contract or liability, and one party is dead, the survivor alone should be sued. There are some exceptions to this rule under special circumstances: (*Lawrence v. The Trustees of Leake, &c.*, 2 *Denio*, 580; *Garret v. Shuster*, 1 *Wendell*, 148; *Brewster v. Patterson*, 4 *Edwards*, 466. And in the Court of Appeals, *Parker v. Jackson*, 16 *Barbour*, 41; *Higgins v. Rockwell*, 2 *Duer*, 651; *Voorhies v. Baxter*, 1 *Abbotts' Pr. R.*, 43).

It deserves notice as to the three last cases, being since the Code, that the Codifiers supposed they had changed the rule in accordance with the English authorities. See them cited in the assistant vice-chancellor's opinion, (2 *Denio*, 580). In their observations upon sections 97 and 98, (now 117 and 118), they say, that these will enable a surviving partner and the representative of a deceased partner to sue together, whenever desirable, and will enable a plaintiff to exhaust in one suit his remedies against a surviving partner, and the representatives of a deceased partner. The last clause of the 118th section, beginning with the words, "or who is a necessary party," was added in 1849. The addition does not certainly weaken the language which the Codifiers supposed covered the case.

But it appears to me that there is a sufficient ground to distinguish the present case from those cited. In those cases, the entire legal right to the property of the partnership survives. The fund in the survivor's hands is the first fund to be applied to the discharge of the debt; but here there is no such ele-

ment. The purchase does not appear to have been made on joint account for any partnership or joint purpose. These parties would be tenants in common if the purchase had been consummated.

It may be useful to advert to some acknowledged rules of the court of chancery, tending to illustrate this question.

Thus, on the death of a vendor, both his devisees or heirs, and his personal representatives, are necessary parties to a bill for performance, the former to make a conveyance and the latter to give a discharge of the purchase-money, (*Townsend v. Champermorne*, 9 *Price*, 130); and so the converse of the rule is true. If the vendee dies, the personal representative must be brought in, as he is to pay the money, and the devisee or heir, as he is to receive the conveyance and look to the title. (*Ibid.* and see *Champion v. Brown*, 6 *John. Ch. Rep.*, 398).

I may observe here, that the cases of *Merserau v. Ryerss*, 3 *Comstock*, 261, and *Stuart v. Kissam*, 11 *Barbour*, 282, do not appear to affect the present question; they relate to the general creditors of an estate seeking to unite the representatives of the real and personal property in one action.

De Agreda and Guynet, under this agreement and the principal of a court of equity, were equitable tenants in common of this property. In relation to their own action then, the case of *Fallowes v. Williamson*, 11 *Vesey*, 306, would apply. There the representatives of one tenant in common and a co-plaintiff filed a bill of survivor, and were obliged to make the co-plaintiff a party, as well as the defendant. And in this point of view, while it may be said, that their contract to pay has the form of a joint contract, their interest and right in the property to be received, and the subject of the suit, is joint and several. Another and unquestioned series of cases establish, that the survivor and the representatives may then be joined. (*Pierson v. Tester*, 3 *Swainston*, 139, *n.*; *Angerstein v. Clarke*, *Ibid.*, 147, *n.*; *Haywood v. Overs*, 6 *Mad. Rep.*, 113; *Madox v. Jackson*, 3 *Atkins.*, 406; *Bland v. Winter*, 1 *S. & St.*, 246).

It results from the following observations, that the judgment cannot be carried into effect, so as to sell the whole property,

and to recover the whole if any, deficiency, until the representatives of Guynet are before the court.

The representatives of Guynet may, of course, make themselves parties to each suit, by a motion, under the 121st section of the Code. If they neglect it, then the remaining plaintiff may, under the Code, or at any rate under the Revised Statutes, make the representatives of Guynet defendants in the original suit when eighty days have expired from his death. (2 *Rev. Stat.*, 185, § 117). And if De Agreda neglect it, then Mantel can petition to have the suit revived in their names, or that the action be dismissed so far as their interests are concerned. (5 *ibid.*, § 118; 5 *Sandford's Rep.*, S. Ct., 648). Besides, after a decree, a defendant can revive a suit without the aid of the statutes. (*Lorillard v. Dios*, 9 *Paige*, 394, and cases).

Again, as plaintiff in the cross-action, Mantel has a course open to him under the Revised Statutes, (§ 108, 109, and subsequent sections), to bring in the representatives of the defendant. (See 1 *Hoffman's Practice*, 373). It is also the rule, that a bill of revivor might be resorted to as well as the petition under the statute. (2 *Paige*, 380; *Douglas v. Sherman*; *Humphreys v. Holls*, *Jacobs' Rep.*, p. 73).

The personal representatives, as before observed, would be necessary parties, and they may be sued as soon as they have taken out letters probate or of administration. (*Butts v. Genune*, 5 *Paige*, 258). Although the heirs cannot be sued until the expiration of three years, for payment of a debt, out of lands descended, yet I do not think this would form an objection to making them parties, solely with a view that they may look to the title, and aid in protecting any eventual rights they might have in the personal estate, no decree for any deficiency being made against them.

It may be that the course of proceeding under the 376th and subsequent section of the Code, may be pursued in this case, and the personal representatives of Guynet be brought in to have the judgment enforced against the assets. The heirs might perhaps be made parties to the summons, not to have their property descended then made liable, but to look to the title and conveyance.

There remains one important question, viz., whether the 108th section of the Statute in connection with the 122d section of the Code, does not enable Mantel to proceed and execute the judgment, so far as *De Agreda's* interests are concerned.

The 108th section of the statute is, that where one or more of the complainants or defendants shall die, and the cause of action not survive, the suit shall abate only as to the person or persons so dying, and the surviving parties may proceed without reviving the suit.

The 122d section of the Code, provides that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights, but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

And by the 274th section, in an action against several defendants, the court may in its discretion, render judgment against one, or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. If a several judgment could be taken for a sale of a moiety of the land, and a recovery of a moiety of the deficiency, a separate execution can issue upon the judgment already obtained, though in form against both.

In *Leggett v. Dubois*, (2 *Paige*, 212), the bill was for the specific performance of an agreement to convey land, brought against the seller and his trustee. The land had been conveyed to other defendants with notice as alleged. Sellon died without answering. The chancellor ordered the complainant to proceed within sixty days to revive the suit against the legal representatives of Sellon, or consent to proceed against the surviving defendants only, or the injunction should be dissolved. In commenting upon the 108th section, he observes, that it provides for cases, where some of the parties survive and the rights of the parties dying do not survive to them, but some other person becomes vested with their rights and interests, or is subject to the liability of those who are dead. In such a case the complainant may proceed without making such persons parties, provided a decree can be made between

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the surviving parties without bringing such persons before the court. The decree in such case will not affect those in whom the rights of the deceased parties have become vested.

In *Carey v. Davies*, (1 *Hogan's Rep.* 16), the master of the rolls said, "The death of a party abates a suit only as to his interest. To this as a general rule I perfectly agree, but with this addition, that although it abates the suit only as to his interest, yet it more or less renders the suit defective, in proportion as the interest of the party dying, was connected with the other rights in litigation in the cause.

I have no doubt of the right of De Agreda, the co-defendant, to move in this case for the correction of the decree, and to vacate the docket. If any prejudice could arise to the rights of those who may represent Guynet, it could be guarded against in the order, but this cannot be.

The result of my examination of this complicated case is—

That the judgment of affirmance by the general term must be vacated as to the party George Guynet, and must be amended and entered as to the party De Agreda in the manner before stated, and declared to be and remain in full force as to him.

That both dockets of the judgment made at the clerk's office in New York be vacated and discharged without prejudice to any application on the part of Mantel to increase the security given on the appeal so far as relates to the said De Agreda.

That the proceedings to execute the judgment as against the estate and interests of the said Guynet in the premises or otherwise, be stayed until his representatives be brought before the court according to its practice.

That the said Mantel be at liberty to execute such judgment by a sale, in the manner therein directed, of all the undivided share, right, title and interest of the said De Agreda in and to the premises mentioned in such judgment, and to proceed against him for the one-half part of any deficiency which may be ascertained upon such sale.

That neither party have costs as against the other of the present application.

APPLEBY *a.* STRANG.*New York Common Pleas; General Term, December, 1854.*

## POWER OF JUSTICE OF DISTRICT COURT. — CANNOT OPEN HIS JUDGMENT.

A justice is entitled to proceed with a case immediately upon the expiration of the time named in the summons.

Where, so proceeding, he has rendered judgment, he has no power to open it upon the defendant's coming immediately after and asking to be let in to defend.

## Appeal from a judgment of a district court.

The suit was brought in the Sixth District Court. The summons was returnable at 9 A.M. It is the rule of the justice of that court to wait half an hour after the time of return, except where he is satisfied that the opposite party does not intend to appear, in order to give time for appearance. Through inadvertence it would seem, this case was called at about twenty minutes past nine; the plaintiff proved his case and the justice rendered judgment in his favor. Within the half hour the defendant appeared, and moved to open the case that he might be allowed to defend. The plaintiff objected, and the justice sustained the objection.

The defendant appealed from the judgment rendered for plaintiff.

*N. W. Clason* for appellant.

*George A. Shufeldt* for respondent.

DALY, J.—The justice had the right to proceed with the case immediately upon the expiration of the time named in the summons; and having done so, and rendered judgment, he had no power to open it. As it appears from his return, that he had adopted the rule of waiting half an hour in ordinary cases for the appearing of the defendant, we might give relief upon an affidavit showing that the defendant was misled thereby, and setting forth such a defence as might satisfy us under the statute, that manifest injustice has been done. But there was no error in entering the judgment, and it should be affirmed.



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Harpell *v.* Irwin.

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HARPELL *v.* IRWIN.*'New York Common Pleas ; General Term, December, 1854.*

## EXAMINATION OF PARTIES.—COUNTER-CLAIM.

Where a plaintiff calls the defendant as a witness to prove the plaintiff's claim, and the defendant on a cross-examination in his own behalf proves a counter-claim as set up in his answer, the plaintiff may be examined in reference to the evidence given by the defendant on the subject of the counter-claim.

Appeal from a judgment of a district court.

The facts are stated in the opinion.

INGRAHAM, F. J.—This case is submitted without points.

The notice of appeal states the causes of appeal to be,

1. That the judgment is erroneous.
2. That the court erred in excluding the plaintiff from testifying in his own behalf.
3. That judgment for defendant was erroneous and without evidence.

Upon the trial the plaintiff called the defendant as a witness to prove the plaintiff's claim. He admitted the plaintiff's claim to be correct. On cross-examination he stated he had been in the habit of selling the plaintiff goods. That in Sept., 1852, his claim against the plaintiff amounted to \$89,39. That the plaintiff purchased the goods and they were delivered to him.

The plaintiff then offered himself, to contradict the defendant's testimony on cross-examination. He was excluded, and the justice gave judgment for the defendant for the balance of his claim after deducting the plaintiff's bill.

There can be no doubt that the justice was correct in his decision upon the facts as proven before him. The claims of plaintiff and defendant were proven by the defendant alone, and if he was to be credited as to one, he could not be disbelieved as to the other, when his testimony was uncontradicted.

The only question then is, whether the justice was correct in excluding the plaintiff's testimony. Section 395 of the Code allows a party to call his adversary as a witness, and such adversary may then be examined on his own behalf. If he

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Duguid *a.* Ogilvie.

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testify to new matter not responsive to the inquiries put on the direct examination, or necessary to explain that testimony, or to discharge when his answers charge himself, the adverse party may be a witness.

Here the defendant was called to prove the plaintiff's claim, and after doing so, he testified to a claim due from the plaintiff to him, to double the amount of the plaintiff's. This was clearly new matter, not responsive to the inquiries put by the plaintiff, or necessary to explain or qualify his previous answers. Nor would it come within the clause "necessary to discharge when his answers charge himself." That clause refers to the statement of facts showing that the claim he proves had been discharged. Such for example would be the case, if after proving a claim he should testify to payment or a release, or any other matter showing a discharge of the claim so proven.

But when the party sets up a counter-claim as a defence, and when called as a witness, on cross-examination proves such counter-claim, the plaintiff then has a right to testify as to such counter-claim. (*Myers v. McCarthy*, 2 *Sand. S. C. R.*, 399).

More especially so, when as in this case the defendant asks for a judgment against the plaintiff upon such counter-claim.

The justice erred in excluding the plaintiff from testifying, and the judgment must be reversed.

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DUGUID *a.* OGILVIE.

*New York Common Pleas ; General Term, December, 1854.*

**POWERS OF REFEREE.—RE-OPENING CAUSE.—PRESUMPTION OF PAYMENT REBUTTED.**

Where a cause has been submitted to a referee, he may, if he thinks the purposes of justice require it, re-open the case to hear further testimony.

Where a plaintiff who claimed to recover for services rendered, gives his promissory note to the defendant long after the rendering of the services, and pays it when it falls due, it creates a presumption that no previous indebtedness existed on the part of the defendant to the plaintiff.

But this presumption may be rebutted ; *e. g.* by showing that the note was given for a temporary loan.

Appeal from a judgment upon the report of a referee.

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Duguid & Ogilvie.

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This was an action brought to recover for services rendered by plaintiff to the defendant. The issues were referred. The plaintiff having proved his services, the defendant adduced evidence tending to depreciate the value of them, and also showed, that some time after the services were rendered, the plaintiff gave his note to the defendant for seventy-five dollars, and paid it at maturity. The testimony was here closed on both sides, and the cause was summed up and submitted. The counsel for defendant contended that the making and payment of the note by plaintiff, was decisive evidence that at that time the defendant was not indebted to the plaintiff.

After the lapse of several days, the referee notified the parties to appear; and stated that he should allow the plaintiff to produce further testimony as to the consideration for the note, and the circumstances attending the making it. The defendant's counsel objected to any further testimony, on the ground that the case had been closed and submitted. The referee overruled the objection, and the counsel excepted.

The plaintiff then called the defendant as witness; who testified that the note was given for money lent by him to the plaintiff; that the plaintiff asked him for the loan of some money, saying that he was very much in need of it, and would pay extra interest for it; and that he accordingly lent plaintiff the seventy-five dollars, taking his note; but did not charge him any extra interest.

The referee reported in favor of the plaintiff; deciding that the giving of the note was sufficiently explained by the facts proved; and that under the circumstances it was not sufficient evidence that defendant was not then indebted to the plaintiff.

To this decision the defendant's counsel excepted. Judgment having been entered for plaintiff, the defendant appealed to the general term.

*J. W. White*, for appellant, cited *De Freest v. Bloomingdale*, (5 Den. 304).

*R. Goodman*, for respondent, cited *Sperry v. Miller*. (*Seld. Notes of Cases*. No. 3. p. 12).

DALY, J.—There was no error in the referee's allowing additional evidence to be given after the case was summed up

and submitted to him. It appears to have been done upon his own motion, and was confined to a particular point. The plaintiff, long after he had performed the services for which he sought to recover, gave the defendant his promissory note of \$75, and paid it when it fell due. This appearing in evidence, unaccompanied by any explanation, warranted the presumption that nothing was due to the plaintiff when he paid the amount of this note to the defendant. (*De Freest v. Bloomingdale*, 5 *Den.*, 304). It was in the discretion of the referee to allow the plaintiff, even after the cause was submitted, to remove this presumption by showing the circumstances under which this note was given and paid. It was held in *Cleaveland v. Hunter*, (1 *Wend.*, 104), that after a cause was submitted, and the referees had retired, they might open the case to hear further testimony. In the present case the parties were fully notified as to what extent further testimony was to be allowed. The additional testimony consisted in the examination of the defendant himself alone. It has satisfactorily explained why the note was given and paid; and having thereby tended to promote the ends of justice, it would evince on the part of the court a disregard of the chief end and aim of any legal investigation to set the referee's report aside upon that ground.

The evidence of the defendant showed that this note was given for money borrowed of the defendant by the plaintiff upon a pressing emergency, for twenty-five days, and for which he offered to pay additional interest. The defendant having been placed on the stand as a witness by his adversary, it was competent for him, if such was the fact, to prove that the claim for services had been adjusted and paid, or give in evidence any act of the plaintiff, or any conversation between himself and the plaintiff, from which it might be inferred that the payments made to the plaintiff, were received by him in full satisfaction of his claim. Not having done so, it may fairly be presumed that the claim for services remained unadjusted, and that the giving, and the payment of the note, was a separate and distinct transaction, upon which no presumption could be founded as to the real state of indebtedness between the parties.

The evidence in respect to the value of the services, was

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Jacks *a.* Darrin.

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conflicting, and in such cases we never interfere, though I confess I am unable to decide upon what basis the referee fixed the value of the services, as he appears to have done at \$210. Some of the witnesses estimated the value of the services at a higher sum, others at a lower, and we cannot say that he erred in abating something from the estimates of the former in deference to the opinions of the latter, or in adding something to the estimates of the latter in deference to the opinions of the former.

Judgment affirmed.

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JACKS *a.* DARRIN.

*New York Common Pleas ; General Term, December, 1854.*

LOST CHECK.—RECOVERY MAY BE HAD ON INDEMNITY.

A check is a bill of exchange, within the statute, authorizing a recovery upon a lost bill of exchange when the bond of indemnity required by the statute is tendered to the defendant upon the trial and parol proof thereof of the contents of the instrument given.

The dictum in 2 *Coven's Treatise*, 184, 2d ed., that if a bill of exchange is lost *after action brought*, no recovery can be had upon it, shown to be erroneous.

Appeal from a judgment of the Marine Court.

This action was brought against the defendant, as maker of a check. At the joining of issue the check was produced, but it was lost before the cause was brought on for trial. On the trial, before Phillips, J., January 31, 1854, the check appearing to be lost, the plaintiff offered a bond of indemnity, pursuant to statute. Objection being made, the justice refused the bond.

The plaintiff then requested leave to put in a supplemental or amended complaint, and to be allowed to prove the contents of the lost instrument by parol. Also refused, and complaint dismissed. Plaintiff appealed.

*W. R. Strafford*, for appellant.

*Van Antwerp and James*, for respondent.

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Jacks a. Darrin.

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DALY, J.—A check, is a bill of exchange, within the meaning of the statute, authorizing a recovery upon a negotiable bill of exchange which has been lost, upon giving parol evidence of its contents, and tendering to the defendant at the trial the bond of indemnity provided for by the statute. (*Boehm v. Sterling*, 7 *Johns. R.*, 419. 426; *Cruger v. Armstrong*, 3 *Johns. Cas.*, 5. 7, 8; *Merchants' Bank v. Spicer*, 6 *Wend.*, 443; *Murray v. Judah*, 6 *Cow.*, 484; *Harker v. Anderson*, 21 *Wend.*, 172).

No amendment of the complaint in the case was necessary. The plaintiff was entitled to recover upon tendering the bond of indemnity, and proving by parol, the contents of the instrument. He proposed that the case should proceed, and that if it was found that he was entitled to recover, that he should file the necessary bond. This might be allowed when it appeared that the plaintiff had not discovered the loss of the check until the calling of the cause, though in fact I see no objection to allowing him to file the bond at any time before the cause is submitted for decision, except the loss of the time of the court if he should not then be prepared to tender it. The justice, however, appears to have held, that as the check was lost between the day of the commencement of the action and the day of trial, the statute did not apply to such a case. This was clearly erroneous. The dictum in 2 *Coven's Treatise*, 184, 2d ed., is founded upon *Poole v. Smith*, a *nisi prius* case, in *Holt N. P.*, 144; but that case was simply in affirmance of the English doctrine, that an action could not be maintained in a court of law upon a lost negotiable instrument, the remedy being in equity where a bond of indemnity might be required for the defendant's security, there being no means by which courts of law could provide for this security; a doctrine affirmed by this State, in *Rowley v. Ball*, 3 *Cow.*, 303, and which led to the enactment of the statute in question. The ruling in the case in *Holt*, was not upon the special ground that the action could not be maintained because the note had been lost *after suit brought*, but that fact was relied on by the plaintiff as excepting it from the general rule, as the plaintiff had a right of action when the action was brought, it being in proof that the check had been shown to the defendant after

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the commencement of the suit and he had admitted it to be his, with the additional fact that the check at the time of trial was barred by the statute of limitations, and could not be recovered against the defendant by any third party who might get possession of it; nor is any such distinction to be found in the statute. Under the ruling of the court below, therefore, it would not have availed if the plaintiff had been ready with and tendered a bond, and I think, therefore, that the judgment should be reversed.

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FAIRBANKS *a.* CORLIES.

*New York Common Pleas ; General Term, December, 1854.*

TRIAL IN DISTRICT COURT.—JURISDICTION OF JUSTICE.—NON-RESIDENCE OF PARTIES.

The refusal of the justice of a district court to suspend a trial after witnesses have been examined, for the purpose of enabling one of plaintiff's witnesses to leave the court to search for papers mentioned in a subpoena *duces tecum*, served on such witness by the plaintiff shortly before the witness was sworn, is no ground for reversing the judgment.

Where the evidence is conflicting, the finding of the justice will be deemed conclusive upon the facts.

Where a plaintiff voluntarily brings his suit before the justice of a district in which neither the plaintiff nor defendant resides, and goes to trial upon the merits, and recovers a judgment against the defendant, though for less than the plaintiff's demand, (it in no wise appearing on the trial that the parties do not reside within such district,) the plaintiff cannot by appeal from such judgment require the appellate court, to reverse the judgment upon the ground that the justice had no jurisdiction by reason of such non-residence.

It seems that a judgment so procured is not *as to the plaintiff*, procured contrary to the meaning and intent of the statute requiring suits in the justices' courts to be brought in the district where one of the parties resides; and if otherwise the plaintiff is so far precluded by his own voluntary acts that he cannot have a reversal on appeal.

Appeal from the judgment of a district court.

The suit was brought to recover for services rendered and disbursements made in an examination of title. One Judah, having been examined by defence to show the insufficiency

of the examination made by plaintiff, stated upon his cross-examination, that a subpoena *duces tecum*, requiring him to produce the abstract of title prepared by the plaintiff, was served upon him after he entered court, and while he took the stand as a witness,—but that he could not produce the abstract for want of notice previous to the moment of giving his testimony.

The plaintiff requested the justice to suspend the trial to enable the witness to procure the paper. This the justice refused to do.

Evidence on both sides having been put in, the justice rendered judgment for the plaintiff for the amount of his disbursements only. The plaintiff appealed upon several grounds, among others, alleging that the justice had no jurisdiction; and upon the appeal, showed by affidavit annexed to his points upon appeal, that neither party resided in either of the wards within the jurisdiction of the justice.

**Plaintiff in person.** An assistant justice elected under the act of 1848, (*Laws of 1848, ch. 153*), has no jurisdiction where the defendant and one of the plaintiffs reside in the city, and neither of the parties reside in a ward within the justice's district. (*Cornell v. Smith, 2 Sand. S. C. R., 290*). Appearing and pleading without objection, do not waive the defect nor confer jurisdiction, the statute being peremptory that the justice shall dismiss the causes. (*Ibid.*)

*J. E. Develin*, for respondent. It does not appear by the return, where the parties resided. Whether or not the justice had jurisdiction is a question of law. An affidavit can only be used to show facts not in the return, can only be used when "the appeal is founded on an error *in fact* in the proceedings not affecting the merits of the action, and not within the knowledge of the justice." (*Code, § 366*). The point raised on the affidavit of appellant is a point of law, not of fact, and therefore not within this section.

Even if the court will permit an affidavit to be used in its discretion, favor should not be shown to the appellant in a case like the present.



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WOODRUFF, J.—The various grounds of appeal which relate to the admission or rejection of evidence do not appear by the return to have any foundation in the proceedings had on the trial. If any objectionable testimony was received, it was received without objection, and it is too late to make such objection for the first time on appeal. If the return is imperfect in this respect, the appellant should have caused it to be corrected and the omissions supplied.

As to the evidence said to have been rejected, I find nothing in the return showing any such rejection.

As to the claim of the appellant that the justice should have suspended the trial to enable the plaintiff to compel one of his witnesses to obey a subpoena *duces tecum*, which was served after the trial commenced, it is at least doubtful whether the justice had any authority after the examination of witnesses had commenced, to suspend the trial without the consent of both parties, except for the simple cause that there was not time to conclude it on the day.

But if he had authority, it was a matter of discretion with which we could not interfere, unless possibly in a case of gross injustice—and finally it was owing to the plaintiff's laches that his subpoena was not sooner served, and the justice was quite right in refusing the application.\*

Upon the merits there is no sufficient reason for a renewal. The appellant insists that the finding of the justice is against the weight of the evidence. The claim of the plaintiff was for an amount due him for searching the title to certain real estate. The evidence was conflicting in regard to the defendant's agreement. Being examined by the plaintiff on his own behalf, the defendant testified in substance that she employed the plaintiff to search the title, and procure a loan for her, upon his agreeing that he would do so for \$25, and disbursements not exceeding \$5; and that so far from performing this agreement on his part, he only placed her in comúnicación

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\* In *Pollock v. Ehle*, decided at the Common Pleas, Dec. Gen. Term, 1854, it was held that a justice ought not to adjourn a cause after the plaintiff rests, to allow defendant to procure evidence which he might have obtained prior to the commencement of the trial.

tion with another party to whom she was required in order to procure the money, to pay \$89 for searching the title and for the disbursements connected therewith, besides a further payment of commissions to a broker through whom the loan was procured.

Although her payment of a large amount was not in itself alone a reason for not performing her agreement with the plaintiff, if he on his part performed his agreement, yet the evidence in this respect warranted a finding that the plaintiff did not perform what he undertook to do. It appeared, however, that the defendant did afterwards consent to pay \$65 in addition to the \$25 first stipulated, but it also appeared that this was not sufficient to effect the object. On the contrary, before she could obtain the money she was required to pay, and did pay, over \$100. The evidence I think warranted the justice in holding that the plaintiff in the first instance undertook that she should have the money at an expense of not exceeding \$30; and that the subsequent modification did not vary the agreement further than to extend the amount to \$90; and even this modification, the defendant testified, was wrung from her by duress of her papers.

In this view we cannot say that a finding that the plaintiff did not perform his contract was against evidence,—indeed it is left in doubt by the evidence whether in fact the plaintiff ever did make any *search* of the title. He certainly did not make one which was effectual for the purpose contemplated by both of the parties. By allowing to him the sums paid out for the certificates procured and furnished by him, the justice has done all that consistently with his finding in other respects he could do.

As to the plaintiff's claim for drawing papers, it must suffice to say, that the plaintiff did not declare for any such services.

The remaining inquiry is, whether the plaintiff can require a reversal of the judgment rendered in his own favor, (though for a sum less than that to which he conceives himself entitled,) upon the ground that the plaintiff and defendant both resided without the judicial district, and that the justice had therefore no jurisdiction.

It is provided by section 103 of the act relating (among

other subjects), to these courts, (2 *Rev. Laws*, 1818), that every action to be commenced before any of the assistant justices, shall be commenced either in the ward in which the plaintiff has resided for at least one month, or in the ward in which the defendant resides; and every such justice is directed and required to dismiss every action brought before him contrary to the provisions of this section, *with costs of suit, to be paid by the plaintiff*, in the same manner as if he were nonsuited on the merits; and every judgment that may be obtained or procured, *contrary to the true intent and meaning* of this section, shall be utterly void.

Under this provision of the act, the present case presents this question:

Can a plaintiff, who has voluntarily selected his tribunal and submitted his cause to adjudication, and obtained a judgment in his own favor, appeal therefrom and require a reversal on the ground that his suit was brought by himself out of the ward and district in which the parties resided?

*First.* Nothing appeared on the trial or in any of the proceedings before the justice, showing that the parties did not reside within his district; and as both appeared and went to trial upon the merits without objection, it was not the duty of the justice to volunteer any inquiry into the residence of the parties.

*Second.* It is provided by section 89 of the same act, "that where *any* parties shall agree to enter an action before *any* assistant justice without process, such assistant justice shall proceed to trial in the same manner as if a summons or warrant had issued." It would be doing no great violence to the statute, if we should hold that a plaintiff, by voluntarily proceeding before the justice, did, in legal effect, submit by his own voluntary agreement to the jurisdiction, so that *as to such plaintiff* the judgment was not obtained "contrary to the *true intent and meaning* of the section above referred to."

*Third.* The section referred to, manifestly contemplates a compulsory proceeding, and was inserted for the protection of the party proceeded against, and it is not unreasonable to say, that so far as the plaintiff is affected by the judgment procured by himself, it is not according to "the true intent and mean-

ing of the section," that he should, after judgment, allege his own wrong in avoidance thereof.

*Fourth.* It may be plausibly urged, that upon a reading of the whole section together, the legislature only intended that when it appeared on the trial that the action was brought in a district in which neither party resided, it should be the duty of the justice to dismiss the action, and that if he did not do so, the judgment he pronounced should be void. The legislature did certainly intend, (as they have distinctly expressed), that when the action failed for this cause, that it should be with *costs of suit* to be *paid* by the *plaintiff*, and not that judgment being pronounced in his favor, *he should* avoid it and leave the defendant to pay costs incurred in the defence. Nor in my judgment did they intend, that after judgment in the plaintiff's favor, he might collect the amount, and then treat the judgment as void. Where no such defect of jurisdiction appears on the trial, it is by no means clear that the plaintiff should be permitted to set up matter not appearing on the record, and arising wholly of his own wrong, and allege it as an error. A plaintiff would not be permitted to assign for error in a judgment in his own favor, that the defendant was an infant, appearing by attorney instead of guardian. In such case, it is true the parallel is not exact, but the analogy is not remote.

*Fifth.* I apprehend the general rule cannot be controverted that it is only the party who is aggrieved by the judgment who can reverse it. The former statute relating to *certiorari* to justice's courts, authorized either party *thinking* himself aggrieved to bring the writ, but it did not follow therefrom that the appellate court must reverse if they found that he had sustained no wrong. And so it was held in *Hughes v. Stickney* (23 *Wend.*, 280). This judgment being in favor of the appellant, and the proceedings being in other respects correct, the plaintiff is not aggrieved by it. The error, if any, in respect to jurisdiction aggrieves the defendant, if any one. He might reverse it if void. (*Striker v. Mott*, 6 *Wend.*, 465). By the Code the mode in which such judgments may be reviewed is altered, but the principles by which such review shall be governed in this respect are not changed thereby.

It is stated by the counsel for the respondent in his argument, that the judgment has been paid. This fact, if relied upon, should have been laid before the court in some authentic form. Had this been done, it would have presented a serious question, whether the limitations upon the prosecution of writs of error in favor of the party recovering the judgment should furnish a principle for our guidance, (2 *Rev. Stat.*, 592, § 3), and whether section 369 of the Code contemplates restitution in such a case.

*Siath.* It would be no hardship to the plaintiff, nor any violence to the law, to hold that when the plaintiff has thus voluntarily submitted himself to the jurisdiction of the justice and had a trial upon the merits, he is precluded from proving non-residence as a ground of reversal, and that his acts should be taken as a conclusive admission by him that the residence of the parties was such as in this respect to entitle the justice to proceed to judgment.

Upon the various points in relation to this question whether the plaintiff is bound by the judgment, I have not intended to express an opinion. It is not necessary that I should do so. Nor do I intend to dissent at this time from the decision of the Superior Court in *Cornell v. Smith* (2 *Sand.*, 290). It may be that a defendant, though he appears, pleads, and goes to trial without objection, may yet seek a reversal, alleging that he is aggrieved by a judgment against him.

But I do intend to say, for many of the reasons above suggested, that we are not called upon to reverse this judgment, and it is to my mind sufficient that no error was committed on the trial by which the plaintiff has been aggrieved, and rendering the judgment in his favor was no grievance to him. If the judgment is utterly void, as he claims it to be, and his acts do not preclude him from alleging and proving the matters which invalidate it, he is in no wise prejudiced by it. It does not even stand in the way of another suit for the same cause of action.

And if the judgment is not void as to him, then it ought not to be reversed, but he ought on every ground to be held bound thereby.

And let it be observed that it does not follow from our

refusal to reverse, that the judgment is not void. In relation to such a judgment, the prevailing party therein stands in a very different situation from him against whom it is rendered. He is entitled to a reversal because such a judgment may be enforced against his property, and the officer levying an execution thereon would be protected. Nothing on the face of the process or even in the judgment itself would indicate that it is not in all respects valid, and upon this ground it was that the court in *Striker v. Mott* above cited ordered a reversal. But the prevailing party, if the judgment is void, loses nothing and can lose nothing by it; and nothing has occurred or can occur to his prejudice by reason thereof. In a case above referred to, Nelson, J., says, (when he deemed the judgment erroneous upon other grounds), "the judgment was clearly erroneous, and the plaintiff (defendant in *certiorari*) could have reversed it, as *he* was aggrieved, but I am not aware of any rule or practice that will permit the defendant (plaintiff in *certiorari*) to right him. I think he should continue to suffer unless he choses to move himself in the matter." So here I think it is the defendant who alone can be said to be aggrieved if any one, and it is right that she should suffer if she do not complain of the wrong. The plaintiff has no occasion to ask of us that the defendant be relieved.

It would be hard indeed upon the defendant, if the plaintiff could be permitted to bring his suit, choosing his jurisdiction, going to trial and recovering a judgment, and then come here by appeal and have a reversal with costs, and thus leave the defendant, who is in no wrong in respect to this question, not only to pay her own costs, but also to pay costs in this court.

In my opinion the judgment should be affirmed.

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Hull *a.* Carnley.

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HULL *a.* CARNLEY.*Court of Appeals ; December Term, 1854.*

## EXECUTION.—SALE OF MORTGAGED CHATTELS.

Notwithstanding that chattels are mortgaged, they may be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure is entitled to the possession for a definite period, against the mortgagee.

The sheriff is not liable to the mortgagee for having assumed to sell the whole interest in goods so mortgaged, ignoring the lien of the mortgage upon them. Such a sale passes only the interest of the mortgagor, and the mortgagee is not legally prejudiced by it.

Appeal from a judgment of the Superior Court upon the merits.

This was an action brought against Carnley, sheriff of the city and county of New York, and Colton, creditor in an execution which the sheriff had levied on chattels, in which the plaintiff claimed an interest as mortgagee, and which had been satisfied by a sale of the mortgaged chattels.

The action was tried before Ch. Justice Oakley, a jury trial being waived. His honor found the following facts to be true.

Francis Michelin, a lithographer by trade, was the execution debtor. By a chattel mortgage, which was, on the 15th day of August, 1850, filed in the clerk's office of Kings county, where Michelin then resided, he mortgaged his presses and lithographic stones to Hull, the plaintiff, to secure payment of a debt which became due the 14th day of February, 1851. This mortgage was made in good faith and without intent to defraud. The property was left with Michelin, to be used in his business.

On the 28th of September, 1850, after the making and filing of the mortgage, but before default in the payment of the debt secured by it,—the defendant Colton obtained judgment against Michelin, and issued execution to the defendant Carnley, who levied it upon the mortgaged property. Hull pro-

cured written notice of his mortgage to be served upon the sheriff; but the latter, notwithstanding, being indemnified by Colton, sold outright the whole of the property, *and the entire interest therein*, and satisfied the execution.

When the debt secured by the mortgage fell due, Michelin failed to pay it. The plaintiff then demanded the mortgaged goods or the proceeds of their sale from the sheriff, and compliance with this demand being refused, brought this suit.

His honor decided upon these facts, that sheriff Carnley could not lawfully seize and sell the entire interest in the mortgaged property,—that the defendants were wrong doers, and that the plaintiff was entitled to recover the amount of his mortgaged debt. Judgment was accordingly rendered for plaintiff.

The defendants appealed to the general term, where the judgment was affirmed. (See 2 *Duer*, 99.)

The defendants then appealed to the Court of Appeals. The question raised upon the appeal was, whether the conclusions of law were correctly drawn.

*E. W. Chester*, for appellants, submitted the case upon a written argument.

*D. D. Field*, for respondents. A mortgagee of chattels, although not in possession nor entitled to immediate possession, has a right of action against a sheriff who seizes the entire property, and sells it, regardless of his rights. If it were not so, he would in many cases be remediless. The property might be dispersed or placed beyond his reach.

The mortgage transfers the property to the mortgagee; the stipulation that the mortgagor may retain the possession till default, only renders him a bailee for the time being. His interest does not extend to the absolute control and disposition of the property. He cannot sell the entire property to another, and the sheriff cannot sell more than the mortgagor could have done.

DENIO, J.—I consider it well settled that chattels which have been mortgaged may notwithstanding be seized upon execution



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against the mortgagor when he is in possession, and at the time of the seizure is entitled to the possession for a definite period against the mortgagee. This was assumed to be the law in *Mattison v. Banars* in this court, (1 *Comst.*, 95), and the principle has been repeatedly recognized by the former and the present Supreme Court and the late court for the Correction of Errors, and has never, so far as I know, been denied by any court in this State. (*Otis v. Wood*, 8 *Wend.*, 498, 500, per *Savage, C. J.*, citing *McCracken v. Luce*, unreported; *Smith v. Downing*, 7 *ibid.*, 135; *Bailey v. Burton*, 8 *ibid.*, 339, 348; *Wheeler v. McFarland*, 10 *ibid.*, 318; *Randall v. Cook*, 17 *ibid.*, 53; *Bank of Lansingburgh v. Crane*, 1 *Barb., S. C. R.*, 542). The defendants did not therefore do an illegal act in seizing the property on the execution against Michelin the mortgagor.

But with a knowledge of the plaintiff's mortgage, the defendant Carnley, as sheriff, by the procurement of the other defendant, sold the property generally without any recognition of the plaintiff's lien, and did not in terms, as it is argued he ought to have done, limit the sale to the interest of the judgment debtor. At the time of the sale, as well as when the seizure was made, Michelin was entitled to the possession, no default in paying the mortgage having occurred, and the time of making the first payment not arriving until more than three months afterwards; and the mortgage moreover contained an express stipulation that, until default, the mortgagor should be entitled to the possession. I may here mention, in order to present all the material facts in the same connection, that this action was not commenced until after a default in payment had taken place, and that before bringing the suit the plaintiff demanded the articles of the defendants. They could not however give them up, for they were in the hands of the purchaser at the sale.

Assuming the chattel mortgage to have been a valid instrument, (and I see no reason to doubt but that it was such), the sheriff had a right to sell the interest of the mortgagor and deliver the property to the purchaser, and the purchaser was warranted in taking it into his possession, and in using it for the purposes to which it was adapted, until the day of payment; and he had moreover a right to pay the mortgage debt,

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and thus extinguish the lien. Now whether the sheriff assumed to sell the whole interest, ignoring the existence of the mortgage, or limited the sale to the mortgagor's interest, expressly recognizing the mortgage and selling subject to it, the right of the purchaser and of the mortgagee would in either case be precisely the same. The mortgagee would not be deprived of his interest by a sale which did not recognize the mortgage, nor would the purchaser under such a sale acquire anything more than the interest which was bound by the execution, to wit, the right of the mortgagor to the premises and the equity of redemption; and these would be the respective rights of the parties if the sale was limited in terms to the interest which could effectually be sold, that is, the title of the mortgagor. The effect of the sale on execution against the mortgagor would be the same as voluntary transfer of the mortgaged articles by the mortgagor to a third person. Such a disposition of them would not oust the mortgagee, whether his interest was repudiated or was recognized; such sales, whether judicial or private, pass such title as the vendor, or party against whom the authority to sell exists, had to part with, and no other. The mortgagee, it is true, may be in a worse position in some respects by the property's passing into other hands, for he must keep sight of it so as to be able to find and take possession of it when his title shall become absolute by a default in payment. But he is not legally prejudiced, for the mortgagor may, when not restrained by the terms of the mortgage, remove it from place to place at his pleasure. He has the same right to do so which a purchaser on execution against him has. I do not therefore see any reason why such a sale as was made in this case should be considered a conversion of the property, or a disturbance of the mortgagee's title. That title was not divested or interfered with, and there was no disposition of the *corpus* of the property which was not authorized by law. When the mortgagee's title became absolute he could claim his goods in the hands of the purchaser, or maintain an action if they should be withheld from him. Upon principle I am therefore of opinion that the judgment of the Superior Court cannot be sustained.

I do not think the case of *Wheeler v. McFarland* (10 *Wend.*,

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320), which is relied on by the plaintiff's counsel, tends to prove his position. The property which was in question in that case was pledged for the payment for labor which had been bestowed upon it to its full value; and the view which the court took of the case was, that the pledgee was in possession, as he must have been to constitute a valid pledge. The execution was against the pledgor, and the court held that the sheriff, who had seized and advertised the property, was liable in replevin to the pledge, because in his advertisement he offered the whole property, and did not propose to sell subject to the plaintiff's lien, but in defiance of it. The authority to sell the pledgor's interest is given by statute, (2 R. S., 366, § 21), and does not contemplate that the purchaser shall take possession by virtue of the sale until he has complied with the terms and conditions of the pledge. It does not authorize any thing hostile to the interest or possession of the pledge. The court in that case considered the levy and advertisement as equivalent to divesting the plaintiff of his possession; and as the sheriff had no right to do that, and as the plaintiff could not be deprived of his possession unless temporarily for the purpose of a sale, until his lien was extinguished, it was held that this action was sustainable against the sheriff. The principle adjudged has no application to a case like the present, when the judgment debtor was entitled to the possession, and the party seeking to recover against the officer had no right to the possession at the time of the sale. The case itself was reversed in the Court of Error on the ground that the plaintiff had parted with the possession before the levy, (26 Wend., 467). But the principle of law which was decided may nevertheless be correct. (See *Bakewell v. Ellsworth*, 6 Hill, 484; *Stief v. Hart*, 1 Comst., 20).

The cases which have been decided respecting the sale of the goods of corporations or joint owners upon executions against one partner or joint owner have a stronger analogy to this case; but I think they do not govern it. (*Phillip v. Cook*, 24 Wend., 386; *Hodell v. Cook*, 2 Hill, 47 and note; *Walsh v. Adams*, 3 Den., 125). All the partners or joint owners have an equal right to the possession with the one against whom the execution issues. The interruption of that possession is an in-

jury which can only be justified by the process. By assuming to sell the whole interest when the authority extends only to one aliquot share, and delivering possession to the purchaser pursuant to such sale, the other owners are immediately divested of a concurrent right of possession. The authority to disturb the possession of the other owners, is conferred by law, and to be effectual must be exercised in the manner which the law directs; and doing it in any other manner is an abuse of the authority, and renders the officer a trespasser from the beginning. This is the ground upon which the doctrine is placed by Judge Cowen in *Wadden v. Cook*, and upon this principle only can the decision be sustained. In the case under review there is, as before remarked, no disturbance of any present right of possession. The mortgage is in the same precise situation after the sale as before. No possession is involved and no right is disturbed. It would be strange if in such a case a trespass had been committed.

The interest of a mortgagee of chattels out of possession and without an immediate right to the possession, in some respects resembles that of the lessor of goods for a limited time. The lessee in such a case has the present possession in fact and by right, but the lessor has the ultimate property, and consequently the right of possession at the end of the time. The title of the lessee is vendible on execution, but it is not necessary that in conducting the sale the officer should specify that he sells the interest of the tenant only. A sale in general terms, such as was made of the mortgaged property in this case, passes such title as the lessee had; and inasmuch as the lessor is in no respect injured, he can maintain no action against the sheriff for selling in that manner. That precise question was decided in *Van Antwerp v. Newman*, (2 *Cow.* 543). Chief Justice Savage, in giving the opinion of the court, remarked that the sheriff had authority to sell the interest of the lessee, but that it was not in his power to divest the lessor of his property in the goods, and that he had not done so. The case does not seem to me distinguishable from the one under consideration.

There is another difficulty in the plaintiff's case. How can the defendants be held to be trespassers for interfering with

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property, to the possession of which the plaintiff at the time of the act done had no right? In *Ward v. Macauley*, (4 *Term R.*, 489), the plaintiff had demised a house ready furnished, and during the term the lessee had a judgment recovered and an execution issued against him, upon which a portion of the furniture was seized by the sheriff, and the landlord brought trespass against him. The court held that the plaintiff could not recover, on the ground that the plaintiff was not in possession when the alleged trespass was committed; but Lord Kenyon, C. J., intimated that trover might have been maintained. A similar question again arose in *Gordon v. Harper*, (7 *ibid.*, 9), where the action was trover against the sheriff for selling goods belonging to the plaintiff in the possession of his tenant; and it was held that the action could not be maintained. Lord Kenyon said that what had fallen from him in *Ward v. Macauley*, to the effect that trover would lie in such a case, was an *extra-judicial* opinion, to which upon further consideration he could not subscribe. Ashurst, J., said that to maintain trover the plaintiff must have property in the thing and a right of possession, and that unless both of these rights concurred, the action would not lie. Although all the forms of action are abolished, still we must, in determining the law on a particular subject, in the first place inquire under what forms the right claimed was formerly asserted, and then ascertain from adjudged cases whether an action could be sustained upon the facts of the case under consideration in any form heretofore used. Trover or trespass would have been appropriate remedies for the injuries complained of in this case, if any action could have been sustained; no injury to the property itself was proved, but the complaint was that the defendant had illegally deprived the plaintiff of its possession. On the ground that the defendants were justified by the process in doing what they are proved to have done, and the further ground that the plaintiff had not such a right of possession as to warrant him in bringing this action, we are of opinion that the judgment of the Superior Court was erroneous and ought to be reversed.

EDWARDS, J., rendered a dissenting opinion.

## COONS v. CHAMBERS.

*Court of Appeals ; December Term, 1854.*

## EVIDENCE.—EXPLANATION OF WRITTEN CONTRACT.

It is a question of fact, when an instrument bearing no date was made.

Correspondence between the parties to an agreement, bearing date prior to the agreement, is inadmissible (the date being unimpeached) in explanation of the written contract.

Appeal from judgment for plaintiff, upon report of referee.

This action was brought in the Supreme Court, in the Third District, to recover for services alleged to have been performed by plaintiff for defendant, pursuant to a written agreement, bearing date the *thirtieth November*, 1849. The cause was referred.

In the course of the hearing before the referee, the plaintiff offered in evidence with a view to explain the true construction of the contract, a letter to him from defendant, dated the *nineteenth October*, 1849. The defendant objected that it could not be received in evidence for that purpose, because it bore date prior to the contract. But the referee overruled the objection, and admitted the evidence. The defendant excepted.

The referee having reported upon the issues, in favor of the plaintiff, the defendant appealed from the judgment entered on his report, to the general term; where it was affirmed; and defendant appealed to the Court of Appeals.

*J. V. Loomis*, for appellant.

*G. Stow*, for respondent.

GARDINER, J.—This action was upon an agreement between these parties under seal. The subjects of it were, a patent for the territory of New York, for the making and vending of elevators, for the raising of muck, mortar, merchandise and other weights, and the construction of these machines by the plaintiff in pursuance of the specifications of the patent, and with such improvements as might be suggested, in the language of the agreement, by the inventive genius of the plaintiff. The main controversy between the parties relates to the meaning

and true construction of the contract between them. The original agreement was dated on the 30th of Nov., 1849, and was executed by Coons only. "In connection with and addition to" this contract, as the instrument recites, another writing was endorsed on the original contract, containing provisions different from it in reference to the payment of the expenses to be incurred in the construction of the machines, which was executed by both parties, but not under seal. The defendant gave in evidence a third instrument, signed and sealed by Coons, the plaintiff, bearing date the 17th January, 1850, purporting to be a receipt of "twenty-five dollars, part of fifty dollars, named as funds which were to have been paid, on or before the 15th December last." The receipts contained a provision upon the part of Coons, "not to call for the remaining \$25 until after the completion of two of said machines named in the annexed article, and to await the directions of the defendant, as to the third, until he should conclude upon the form." The construction of those various instruments, containing distinct stipulations in reference to the same subject, depends essentially, upon the order of time when they were executed. If the writing indorsed in the original article was, as the plaintiff insists, made subsequent to the 17th of January, the date of the receipt, it would annul or materially modify the stipulation of that instrument, instead of being controlled by them. This was a question of fact, which it is to be presumed that the referee has found in favor of the plaintiff; which is accordingly approved by the Supreme Court, in their opinion, and with which this court will not interfere. If the assumption is well founded, I can perceive no objection to the interpretation which the Supreme Court has given to the contract, as a whole.

But the case is here presented on a bill of exceptions, and upon the hearing before the referee, the plaintiff offered in evidence a letter from the defendant to the plaintiff, dated the 19th of October, 1849, some time prior to the agreement upon which the plaintiff had counted in his complaint. It contains directions to the plaintiff "to use his best judgment in getting up the machines, and to do one at a time, and as cheap as practicable, and to pay for the work when completed," &c.

This evidence was objected to, on the ground that it was anterior to the contract, and the objection overruled by the referee, and his decision excepted to by the defendant. The evidence was clearly inadmissible. The merits of the controversy, so far as the opinion can be formed from the case before us, would seem to be with the plaintiff. But upon a bill of exceptions, I do not perceive any way in which the judgment can be sustained. It must be reversed for the reason assigned, with costs to abide the event.

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EVERSON *a.* GEHRMAN.

*Supreme Court, First District; General Term, December, 1854.*

**COLLUSION.—CONFESSION OF JUDGMENT.—PARTNERSHIP.**

No power is implied as within the scope of partnership authority, unless such as the partners can be presumed to have intended to grant to each other.

A partner has no authority to confess judgment on behalf of the firm, contrary to the wish of the co-partner.

Judgment entered against both upon an accepted offer of one to let judgment be taken against him, is irregular.

Such judgment will not be allowed to stand as against the other even as security, where it appears to have been entered by collusion between the debtor offering and the plaintiff.

**Motion to set aside judgment.**

The defendants were partners; and were indebted to the plaintiff, who was the father of one of them. He asked the firm to confess judgment for the debt; his son was willing to, but the other partner refused. Under these circumstances the father and son colluded to have suit brought by the father against the son's firm, and the son, keeping the matter from the knowledge of his partner, made an offer in writing, signed in his individual name, to let the plaintiff take judgment against him. This offer plaintiff accepted, and thereupon entered judgment against both the defendants. At special term on motion of defendant, Gehrman, to set aside the judgment as irregular and collusively obtained, the judge allowed



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him to be let in to defend, but directed that the judgment stand as security, and further permitted the defendant Everson, to amend his offer upon which judgment was entered, so that it should be the offer of the firm, and signed by the firm name.

The defendant Gehrman appealed.

*H. C. Van Vorst*, for defendant Gehrman, contended that the offer accepted was not that of the defendants, and therefore would not sustain judgment against both. The judgment was moreover collusive.

*J. W. Nye*, for plaintiff. The judgment was perfected in strict conformity with sections 136 and 382 of the Code. The defendants are "joint debtors." The summons and complaint were served upon the defendant Everson, and the plaintiff "proceeded against the defendant served," and "recovered judgment," which section 136 authorized him to enter against both, so that it might be enforced against the joint property of both, and the separate property of the defendant served.

MITCHELL, J.—The defendant, Gehrman, moved at special term to set aside a judgment against him and J. C. Everson, for irregularity, and also as entered by collusion between the two Eversons, and in fraud of Gehrman's rights. The motion was denied, and the defendant Everson allowed to amend an offer to confess judgment, so that it should be in the joint names of the firm, instead of being in his name alone. The defendant Gehrman appeals.

It may fairly be inferred, from the affidavits in this case, that Gehrman became indebted to the plaintiff in the year 1853, in a sum exceeding three or four thousand dollars; that on the 1st day of January, 1854, Gehrman and the plaintiff's son entered into partnership, and the debt remaining unpaid, the plaintiff agreed with the defendants, in March, 1854, that they should give him \$2,487 45, and that he should then give to his son the balance due to the plaintiff. In April, 1854, the son gave to the father \$687 45, in bills due to the firm, and the note of the firm for \$1,800. Such an agreement, made by

the firm in good faith, and with the concurrence of both of its members, would bind the firm; the loss of the plaintiff in releasing part of his debt was a sufficient consideration for it. In August the plaintiff applied to the defendants to pay the note of \$1,800, or to secure it. They said they could not. He asked for a judgment, but Gehrman refused to give one; and he swears that Gehrman said that if any one sued him, he would sell his property and dispose of it so that such person could not collect the judgment. At the same time the son was desirous that judgment should be confessed. Thus the plaintiff and his son, the partner of Gehrman, each knew that Gehrman was determined that the plaintiff should not have any preference by a judgment against the firm. With this knowledge, the father and son immediately contrived their plans and carried them out; and the question is, whether they should be aided by the court to make effectual a scheme in which they colluded together to gain an advantage to the father over other creditors of the firm, against the known and express wishes of Gehrman, the other member of the firm.

The facts clearly show that the action against the defendants was commenced and carried on by, and all its parts arranged in concert between, the plaintiff and his son, and designedly concealed from Gehrman, the partner of the son, and with the knowledge that he was opposed to any such scheme. The plaintiff's counsel admitted it, and while the defendants' counsel called it a collusion to defraud Gehrman out of his rights, the plaintiff's counsel insisted that it was a plan to do good.

The plaintiff's attorneys lived in Madison county, not far from the residence of the plaintiff; they conducted all the proceedings and all the papers in the cause, including the offer of the defendant Everson, and any other papers on the part of the defendant were in their handwriting.

The summons was addressed to both defendants; it had no date to it. The complaint was on the \$1,800 note, and was sworn to by the plaintiff on the 21st of August, 1854. The same day the plaintiff's attorneys made affidavit of the service of the summons and complaint on the defendant Everson. At this time Gehrman was in his store, and could have been also served with the same papers. And this must have been known

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to the plaintiff and his attorneys; but they designedly refrained from serving them on him, as that would have frustrated their scheme. On the same day, the defendant Everson signed a paper stating that "the defendant, John C. Everson, hereby offers to let judgment be entered against him in favor of the plaintiff," and that judgment was thereby confessed, in favor of the plaintiff, for \$1,845 50, besides costs. He signed in his own name only. On the same day the plaintiff's attorneys served on the defendant Everson, a notice addressed to him alone, that the plaintiff accepts your offer to let judgment be entered against you, and made affidavit that he had served it on J. C. Everson, one of the defendants. On the same day, also, J. C. Everson made affidavit that the defendants were justly indebted to the plaintiff in \$1,800, and interest from 11th April, 1854, on the above note. On the same day, at 22 minutes after 9 o'clock in the morning, judgment was entered against both defendants for \$1,845 50 damages, and \$10 59 costs; the papers above mentioned forming part of the judgment roll, and execution was issued, and at about 10 o'clock on the same morning, was levied on the stock in trade of the firm of the defendants.

Under these circumstances there could be no doubt that all this was done by father and son in collusion with each other, to give a preference to the father over the other creditors of the firm, and against the known and fixed purpose of Gherman, one of the members of the firm.

The judge at special term allowed the judgment and execution to stand as security, and allowed the defendant Gehrman to defend the action, and also permitted John C. Everson to amend his offer to confess judgment, so that it should appear to be made on behalf of the firm, instead of his own behalf alone, and also to sign the firm name to the offer.

In *Egberts v. Wood*, (3 *Paige*, 517), the complaint alleged that an assignment had been made by Jessup, without the consent of his partner, Vandenburg, and sought to set it aside on that account, but the answer denied this and alleged that it was made with the consent of Vandenburg; this was conclusive on a motion to dissolve an injunction, as that was; (see pp. 519, 521). The chancellor expressly avoided at that time

"expressing any opinion in favor of the validity of an assignment of partnership effects to a trustee, by one partner against the known wishes of his copartner, and in fraud of his right to participate in the distribution of partnership funds among the creditors."—(p. 525).

In *Havens & Dorr v. Hussey, &c.*, (5 *Paige*, 30), the chancellor, repeating the language in 3 *Paige*, characterizing such an assignment as a fraud on the right of the other partner, to participate in the distribution of the partnership effects among the creditors, held, "upon the most deliberate examination, that such an assignment is both illegal and inequitable, and cannot be sustained." And he stated the principle on which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his copartner, from the very nature of the contract of the partnership; the payment of the company debts being always a part of the necessary business of the firm; and that "while either party acts fairly within the limits of such implied authority, his contracts are valid and binding upon his copartner;" that one member of the firm may, therefore, without any express authority from the other, discharge a partnership debt, either by payment of the money or by transfer to the creditor of any other of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm; but that it is no part of the ordinary business of the copartnership to appoint a trustee of all the partnership effects for the purpose of selling and distributing the proceeds among the creditors in equal proportions, and that no such authority as that can be implied.

The tests are here furnished, which determine what acts a partner may do; he may do whatever the articles of partnership expressly authorize him to do, and whatever is within the limits of an implied authority. It is within the limits of the implied authority to do any thing that falls within the ordinary business of the firm, as to purchase goods within their line on cash or credit, and to give the notes or promises of the firm for their payment, and to pay for them in money or any other effects of the firm. But it is not within the implied authority to do any act which, if it were proposed to insert it

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in the articles of partnership, each would immediately scout at; nor to do any act, the effect of which is not to continue the business, but to extinguish it; nor for one member of the firm to appear in a suit against the firm, not to promote the wishes of his copartner, or to defend the suit, but to confess a judgment which he knew the other had declared he would not confess; nor to collude with the plaintiff, thus to defeat the wishes of the one whom he professed to represent. If it were proposed to any persons about to enter into a partnership, whether they meant that either partner might confess a judgment to give a preference against the wishes of the other, there could be but one answer to it, and that answer would show that no such power can be implied as arising out of the intention of the parties, although not expressed. No power can be implied unless it can be inferred that the parties intended to grant it. Their acts may show that intention as well as their express words; but in an implied authority the intent is as essential an element as words are in an express authority. The authority of partners is generally employed in giving acknowledgments of indebtedness, or of payments and promises or obligations to pay, and in disposing of the partnership property. All these are within their ordinary business. They may also prosecute and defend suits. This is on the assumption that they are acting for and under the sanction of their copartner. No such assumption can exist where they and the plaintiff in the suit know that the partner is opposed to their proceedings.

There is more reason for sustaining an assignment to a trustee for creditors, by a single partner, than a judgment confessed or acknowledged by him in the name of his copartner, but against his wishes.

Each partner has an estate in the partnership effects, each owns them *per my* and *per tout*; each, therefore, has such a legal estate in them that his act alone operates to pass the legal title in them; and it is only because such an assignment is a fraud on the rights of the copartner to participate in the distribution of the partnership funds among the creditors, that the assignment by one to a trustee, against the will of the other, is void. But in the case of a judgment, confessed or

acknowledged, the partner confessing it against the wish of his copartner, not only has no authority, express or implied, to do so, but he also is not acting in that matter by virtue of any estate which he has, or directly upon the estate. In the one case, the estate which he has could sustain the mere legal estate which he gives; in the other, the estate which he has, gives him no power to act.

In *Deming v. Colt*, before Justices Oakley, Vanderpool and Sandford, and in *Hayes v. Heyer*, before Justices Duer, Mason and Campbell (3 *Sand.*, 284), it was decided that one member of a firm could not, without the concurrence of his partner, who was at hand or capable of acting, make a general assignment of the property and effects of the firm to a trustee for the payment of partnership debts, even where the payment was without preferences—that it was not incident to the right of one partner thus to select an agent and clothe him with all the authority of the firm. Much less can it be incident to the right of one partner (by indirection even) thus to select his own favorite, and put him in possession of the property of the firm against the wishes of his co-partner.

The defendant, Everson, had power to confess judgment for himself alone; and with that there should be no interference; but not, under these circumstances, for his partner also; and, accordingly, the judgment should be made to conform to the confession or offer made by him, and be a judgment against him individually.

It is not necessary to this case to decide whether an offer to confess judgment, after suit brought, made by one defendant, in good faith, on behalf of both, and with the supposed assent of his co-partner, will not sustain a judgment against both. Here the offer was by one alone, for himself alone, and the judgment is irregular, unless the Court allow it to be amended; and that amendment would be by authorizing one defendant to do an act in the name of the other, which, it is known to the court, that other never authorized, either expressly or by implication, and which he expressly refused to assent to. Neither such dissent, nor any collusion between the plaintiff and one of the defendants, appeared in *Lippman v. Joelson*, (1 *Code Rep. N. S.*, 161, *note*); nor in *Hammond v. Harris*,

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(2 *How. Pr. R.* 115); nor in *Sterne v. Bentley, &c.*, (3 *ibid.*, 331); nor in *Crane v. French*, (1 *Wend.*, 311); *Grazebrook v. McCreddie*, (9 *ibid.*, 437). Nor is this case like those in which an attorney has appeared for both defendants, the court there holding that they could not go behind the record to inquire into his authority to appear, as in *Hammond v. Harris*, and *Sterne v. Bentley, &c.*, *Denton v. Noyes*, (6 *Johns.*, 296); *Grazebrook v. McCreddie*, (9 *Wend.*, 437); *Blodget v. Conklin and Arnold*, (9 *How. Pr. R.*, 442).

In 2 *How. Pr. R.*, 21—*Groesbush v. Brown and Johnson*—Johnson employed an attorney to appear for both defendants, and confessed judgment against both. The attorney was irresponsible, and the judgment was set aside as irregular, and Judge Beardsley said that the attorney had no authority to confess judgment against Brown. This must have been on the principle that Johnson, the partner, could not authorize him to do so. He also said that there was reason to believe there was collusion between Johnson and the attorney and the plaintiff. He also remarked that Johnson might have confessed judgment under the joint debtor act, the declaration being served on him, but that in the case before him, judgment was against both defendants. So in this case, if the defendant Everson is allowed to use the name of Gehrman, in the offer of judgment, judgment must be (not as on the joint debtor act against the property only, but) against Gehrman, (as well as Everson,) if Gehrman had appeared in the suit.

In *Blodget v. Conklin and Arnold*, (9 *How. Pr. R.*, 442) an attorney had appeared, in good faith on his part, for both defendants, and the court allowed the judgment to stand as security, but said that "if collusion between the plaintiff or his attorney and Arnold, or the attorney whom he employed, had been satisfactorily established, the case would have been entirely different, and the judgment would in that case be set aside as against Conklin." This is but a common instance of the aversion which the law always shows to fraud and covin. So, in the case of *Sterne v. Bentley, &c.*, Justice Paige noticed that "fraud or collusion between the plaintiff and the defendant, McLaughlin, or his attorney, was denied by the plaintiff." And in *Denton v. Noyes*, (6 *Johns. R.*, 296), Ch. J. Kent said

"if there had been any collusion between the plaintiffs and the attorney for the defendant, it would have altered the case; but that none was shown or pretended." Here the collusion was between the plaintiff and one defendant, and if the court should sanction the amendment allowed at special term, it would make itself also their instrument.

In *Green, &c., v. Beales* (2 *Cai.*, 254), and *St. John, &c. v. Holmes*, (20 *Wend.*, 609), the court refused to set aside a judgment confessed against two partners, on a warrant of attorney signed by one: but there the one confessing the judgment alone moved to set it aside, and it was good as to him; and it might be that the other had assented, or did not choose to object. There, too, an attorney must have appeared for both. But an individual not an attorney cannot appear in court for another without the express authority of that other.

If this judgment should be sustained, it would open the way to one partner to give preferences as he chose, to any number of creditors of the firm, against the wishes of the other, and so produce the same effect as an assignment to a trustee for such purposes, which the partner could not have made. It would also encourage concealment and contrivance against those to whom the partner owed confidence and good faith. If the partners cannot agree, it is best to allow all the creditors to come in equally, or the most diligent in the fair and regular practice of the law to succeed.

The order should be so modified as to withdraw from the defendant, Everson, the right to make any amendment, and so as to set aside the judgment as against the defendant Gehrman, with costs of the appeal.



## VOGEL v. BADCOCK.

*Supreme Court, First District; General Term, December, 1854.*

## PLEADING.—CAUSES OF ACTION.

The right of a party to recover immediate delivery of a specific thing claimed, given by § 206 of the Code, does not deprive him of the right to dispense with this privilege and await its restitution until he obtains judgment.

Allegations of conversion, and of detention, and prayer for specific delivery, and for damages, held good as a single cause of action, and a demand for only one kind of remedy.

What allegations are sufficient to support claim for specific delivery and for damages.

It is not necessary to allege the consideration of the assignment by which the plaintiff claims title to personal property, although such assignment was made after the conversion and during the detention.

## Demurrer to complaint.

The complaint was, "that on or about the 26th day of April, in the year 1853, at Brooklyn, in the county of Kings, the defendant wrongfully took and converted to his own use, one black horse, of the value of one hundred and seventy-five dollars, the property of Andrew J. Parker. That on the third day of June, in the year 1853, the said Andrew J. Parker, sold and assigned the said horse to the plaintiff, of which the defendants afterwards had notice. And the plaintiff says that he has demanded of the defendant, the possession of the said horse, which the defendant has refused. And he says, the defendant has wrongfully detained, and still wrongfully detains the said horse from the plaintiff after demand made as aforesaid."

"Wherefore the plaintiff claims judgment for the recovery of said property, and damages for the detention thereof, to the amount of two hundred dollars besides costs."

To this the defendant demurred:

I. That it did not state facts sufficient to constitute a cause of action; in that the only conversion alleged was before the assignment, so that plaintiff was not wronged thereby, and that there was no consideration for the alleged assignment.

II. That several causes of action were improperly united; in that the allegations of conversion were in "trover," and those of detention were in "replevin."

III. That the prayer for judgment should be either for damages or for delivery. If both were claimed, the causes for which they were claimed should be separately stated, demanding their respective proper and separate relief.

At special term, judgment was given for the defendant on the demurrer. The plaintiff appealed.

*Waite and Fenton*, for plaintiff.

*G. P. Andrews*, for defendant.

CLERKE, J.—This is an action for the specific delivery of personal property, and for damages for unlawfully detaining it.

The remedy to recover the specific thing claimed is prescribed in § 206 of the Code; and, while it allows the party to claim its immediate delivery, it does not deprive him of the right to dispense with this privilege and await its restitution until he obtains judgment. The language of § 206 is: "The plaintiff, in an action to recover the possession of personal property, *may* at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property;" and § 207 directs what ought to be done when this (immediate) delivery is required. The action of replevin, as defined and regulated by the Revised Statutes, was evidently confined to cases where the immediate restitution of the property was claimed. They make it indispensable that the action should be commenced by writ, commanding the sheriff to replevy the goods, on the execution of a bond, and prohibiting the plaintiff from taking any step until the sheriff received the writ, with the affidavit and bond required; for it was only then that he could serve the summons, which must have been according to the tenor of the writ. We have seen that the language of the Code is much more comprehensive, from its terms, leaving it optional with the plaintiff to take the course referred to in the latter clause of § 206; but, if he does not think proper to take this course, I deem it not only consistent with the terms of this section, but with the whole tenor

and design of the Code, to allow him to seek the specific recovery of property after, as well as before judgment. It will be deemed safer in most cases, doubtless, to claim immediate delivery, as, before judgment could be obtained, the property may be eligned or destroyed, or the wrong-doer may abscond or become insolvent. On the other hand, that course has the disadvantage of requiring the plaintiff to give an undertaking, with one or more sureties, in an amount double the value of the property—a favor which a party may not be able to procure, or may be very unwilling to ask. It is, therefore, proper that a plaintiff may have the liberty of demanding the specific thing claimed, without being compelled to demand it at the commencement of the action. The old action of *detinue* undoubtedly was abolished by the Revised Statutes, precisely as all other forms of action were abolished by the Code; but the right to reclaim the specific article, and to have judgment and execution for its restitution, with damages for its detention, survives, just as the right to recover the amount due on a promissory note remains, although *assumpsit* has shared the doom of all other forms of action.

The preliminary statement in the complaint, that the defendant converted the property to his own use, does not make the action equivalent to *trover*, in which damages alone could have been claimed. This statement was unnecessary, but does not essentially affect the complaint. It would have been sufficient to make the same allegations as are usually contained in cases where immediate delivery is demanded, stating, after alleging the assignment, "that the defendant has become possessed of and wrongfully detains from the plaintiff the property in question," and concluding with the prayer, "that the defendant be adjudged to deliver to the plaintiff this property, with damages for its detention," &c.

In the complaint in question, the plaintiff asks to have a judgment for the specific property and not for damages, except for the detention. In this there is no incongruity; no misjoinder of actions contrary to § 167—in fact, no joinder at all. The complaint sets forth only one cause of action, and demands only one kind of remedy.

There can be no difficulty relative to the assignment. The

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thing sought to be recovered is not a thing in action, but tangible personal property, which could be sold or assigned at any time; and whether the vendor had the actual possession of it or not, and whether it was unlawfully withheld from him or not, in no degree affected his right to dispose of it, and to transfer the right of possession to any other person. No section of the Code, therefore, applies to this case, except so far as the damages, accruing between the time of the conversion and the time of the assignment, are concerned. These may be considered a thing in action, not arising out of a contract, and therefore within the scope of section 111. The damages arising from the continuance of the detention after the assignment, accrued to the plaintiff in his own right, as owner of the property. These can be adjusted at the trial. It is not necessary to allege a consideration for the assignment.

The demurrer should be over-ruled, and the judgment reversed with costs, with liberty to answer.

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McMASTERS v. VERNON.

*New York Superior Court; Special Term, January, 1855.*

COSTS.—ACTIONS COMMENCED BEFORE THE CODE.

In actions, at Common Law, pending in Courts of Record when the Code took effect, and tried afterwards, the right to costs, and the rate of compensation, are governed by the statutes in force at the time the Code took effect.

Costs of proceedings, subsequent to the verdict, to review decisions made at the trial, and taken in the mode prescribed by the Code, are governed by the provisions of the Code.

This was an action of assumpsit. It was commenced and issue was joined in it before the Code. It was tried in 1852. The jury, under the direction of the court, found a verdict for the defendant. The questions of law arising in the case were directed, by the justice trying the cause, to be first heard at the general term, and the entry of judgment to be in the meantime suspended. They were so heard, and judgment was there directed to be entered in favor of the defendants.

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The costs prior to and including the verdict, at the			
rates prescribed by the acts of 1840 and			
1844, are			
			\$ 63 02
"	"	after verdict, at the <i>Code</i> rates, are	137 50
"	"	" " at the rates prescribed by the	†
fee bill of 1840 and 1844, are			
			99 43

The questions now presented are, by what rule are the costs prior to and including the verdict, to be adjusted, and are the defendants entitled to \$137 50, or to \$99 43, for their costs, subsequent to the verdict.

*H. D. Sedgwick*, for plaintiff.

*D. D. Lord*, for defendant.

BOSWORTH, J.—This was a common law action, was at issue before the Code was enacted, and was tried after section 459 was incorporated into the Code, by the amendments made by the act of July 10, 1851. (*Laws of 1851*, p. 876).

Are the costs for services rendered before this amendment took effect, to be taxed under the fee bill of 1840, and those for services subsequently rendered, under the Code, or are they to be wholly taxed under the one law or the other, and if so, under which of them? I speak now only of the costs down to, and including the verdict.

The principle is deemed well settled, that the *right* to costs, and the *rate* of compensation, depend upon, and are controlled by the statutes on that subject, in force at the time the right to costs, if any exists, accrued. (*Supervisors of Onondaga v. Briggs*, 3 *Denio*, 173. *The Brooklyn Bank v. Willoughby*, 1 *Sand. S. C.*, 669. *Rich v. Husson*, 1 *Duer*, 618).

What laws were in force, in respect to costs in such cases, when the verdict in this action was rendered? The acts of 1840 and 1844 had not been absolutely repealed. They were left by the Code in full force and effect, as to all actions pending in courts of law at the time the Code went into operation.

Section eight of the Code, expressly provides, that part *two* of the Code relates only to such civil actions as may be commenced after the 1st of July, 1848, except when otherwise *provided* therein. Title ten of part *two*, entitled "of the costs

in civil actions," contains the provisions of the Code in relation to costs. There is nothing, in any part of that title, which provides, or implies, that its provisions shall affect any suit commenced before the Code took effect. It necessarily follows, that section *eight* in effect declares, that section 303, which repeals all statutes establishing or regulating costs, applies only to actions commenced after the first of July, 1848.

It was for that reason that *section 2, sub. 1*, of the act to facilitate the determination of existing suits, passed April 11, 1849, provided that section 315 of the Code should apply to suits pending on the 1st of July, 1848. (*Laws* of 1851, p. 147 of the Appendix). Section 315 is found in title ten of part two of the Code, and regulates the costs that may be allowed on a *motion*. This shows clearly enough, that the legislature not only did not intend that an absolute repeal of the pre-existing statutes in relation to costs should be effected by section 303, but on the contrary understood that section 8 left them in force, and in all respects applicable to actions at law pending on the 1st of July, 1848.

It necessarily follows that all the costs, except the costs of motions, are to be taxed by the fee bill of 1840, as amended by the act of 1844, unless section 459 of the Code, as it now is, provides a different rule as to all or a part of the costs. That section reads thus:

"The *provisions* of this act apply to *future proceedings* in actions or suits heretofore commenced and now pending, as follows:

"1. If there has been no pleading therein, to the *pleadings* and all subsequent proceedings.

"2. When there is an issue of law, or of fact, or any other question of fact to be tried, to the *trial* and all subsequent proceedings.

"3. After a judgment or order, to the *proceedings* to enforce, vacate, modify, or reverse it, *including the costs of an appeal*."

If the effect of applying the provisions of that act to future proceedings, necessarily, or by fair construction, was to make the rate of compensation fixed by the Code, the rule or measure of compensation for all future services in pending suits, why provide expressly in *sub. 3* of this section, that those rates

should apply to the proceedings upon an appeal from a judgment or order?

If such a provision was deemed necessary to justify such a construction, in respect to the costs of a future *appeal* from an order or judgment in a pending suit, it is not to be inferred that the like interpretation was expected to be given with respect to the costs of the future proceedings provided for by subdivisions one and two of the same section, in the absence, apparently designed, of a similar provision relating to them. (*Rich v. Husson*, 1 *Duer*, 620, 621; *Fitch v. Livingston*, 4 *Sand. S. C.*, 712, 714).

Section 459, as construed by this court, means, that the *mode* and *form* of proceeding prescribed by the Code, to be had in actions commenced under it, shall be pursued in actions commenced prior to July 1, 1848, from the time that section took effect: Which party was to have the *costs* of such proceedings, and the rate of compensation the Code left, as it always had, to be determined by pre-existing statutes. To that construction there is no exception, except in the single instance made by the Code itself, in the concluding part of *sub. 3* of the same section, viz: the costs of an appeal from an order or judgment. It is not to be denied that section 459 has been construed otherwise.

It is thought by some, that the effect of section 459 on section 303, clearly is, that subsequently, the old fee bill was repealed as to all future proceedings, and in force as to all past proceedings. If section 459 has any effect on section 303, or works a repeal either total or partial of section 8, so far as the latter relates to the costs of suits commenced before July 1, 1848, why is this limited effect given to its operation?

If section 459 has the effect to apply the provisions of title ten of part *two* of the Code, to pre-existing suits, then why are not the provisions of that title to determine as well the *right* to costs, as the *rate* of compensation?

The costs of an appeal from a judgment, are in the discretion of the court in two cases only. (*Code*, § 306, *sub. 1* and *2*). Subdivision 3, of section 459, in effect provides that the costs of an appeal, as well the right to them, as the amount to be recovered, must be determined by the Code, and as they

would be, if the action had been commenced after the 1st of July, 1848.

If a *verdict* is a "proceeding" subsequent to the trial, within the proper meaning of that word, as used in section 459, then it is upon the *amount* of the verdict, that the right of a plaintiff to recover, or his liability to pay costs, is made by the provisions of the Code to depend.

A recovery of just \$50, in this case, as in that of *Rich v. Husson*, would entitle the plaintiff to costs. (*Code*, § 304, *sub.* 4). By the Revised Statutes, unless the plaintiff recovered *over* \$50, he must pay costs. (2 *Rev. Stats.*, § 614).

In a case like that of *Rich v. Husson*, would it be sound to hold, that for all proceedings down to the time the amendment of July 10, 1851, took effect, the plaintiff must pay costs, because the Revised Statutes which determined the *right* to costs, and the act of 1840 which regulated the rate of compensation, applied to all proceedings to that time, and the amount of the verdict by those Statutes entitled the defendant to those costs, but that for all subsequent costs the plaintiff should recover, because as to those costs, section 459, and title ten of part two of the Code, controlled, and by the provisions of the latter, the plaintiff was entitled to costs, because his verdict was for a sum, which, by those provisions, carried costs?

It must be borne in mind, that the *right* to costs, in actions at law, prior to the Code, did not depend upon the acts of 1840 and 1844, but upon the Revised Statutes. Those acts only regulated the *rate* of compensation.

Section 303, of the Code repealed neither the one nor the other, as to actions commenced before the first of July, 1848, but as to such actions left them in full force and effect, in all respects, except as to the costs of motions in pending suits.

Section 459, with a view to *assimilate* the *practice* in suits commenced before and after it was enacted, provided by subdivisions one and two, that the *forms* of subsequent procedure should be the same in both, to the recovery of a judgment.

The words "all subsequent proceedings," as used in those two subdivisions of the section, are limited to proceedings terminating in the judgment, for the obvious reason, that subdi-



vision three of the same section provides for all proceedings *after* judgment, and for the costs of those proceedings.

It being conceded, and uniformly decided, that independent of section 459, of the Code, both the right to costs, and the rate of compensation, in suits commenced before the 1st of July, 1848, were regulated exclusively by pre-existing law, it seems to me quite clear, that that section has not repealed that law as to any proceedings in such actions, nor applied to them the provisions of the Code relating to costs, except as to the costs of an appeal. The costs down to and including the verdict must, therefore, be adjusted at the rates prescribed by the acts of 1840 and 1844. As to the costs of the proceedings to review the decisions made at the trial, it is to be observed, that the defendant could pursue either of two modes.

One, that which was taken, pursuant to section 265, of the Code.

The other was, to allow a judgment to be entered; and then appeal from it. Such an appeal would bring up for review all exceptions taken to the decision of the judge. If the latter course had been taken, there can be no question that the costs of reviewing the decisions made, would be governed by the Code.

In either mode of reviewing them, the proceedings would be the same throughout, except that in one case notices of appeal must have been served. In either mode the same questions would be reviewed and upon the same papers, except that if an appeal had been taken, the papers on which the cause would be heard before the general term, would show that a judgment had been entered on the verdict.

The proceeding to review was one provided by the Code, was in substance an appeal from the decisions made at the trial, and was as emphatically a distinct proceeding had under the Code, and by authority of its provisions, as a formal appeal from a judgment. It falls within the spirit of the provisions contained in subdivision 3, of section 459, though not within its strict letter, and the costs for those proceedings, must therefore be allowed at the rates prescribed by the Code.

METROPOLITAN BANK *v.* LORD.*New York Superior Court ; Special Term, January, 1855.*

## PLEADING.—TITLE TO PROMISSORY NOTE.

When a complaint, upon a promissory note, in an action against the *maker* and *payee*, to show title in the plaintiff, avers an indorsement by the payee, and a delivery to the plaintiff, but not saying by whom, and that the plaintiff is "the holder and owner of such note," an answer which puts in issue the latter allegation, and denies that the payee ever delivered it to the plaintiff, but on the contrary alleges that he delivered it to a third person, whose name is stated, is not frivolous.

An answer, putting in issue all the material allegations of a complaint, which are employed to show that the title to a note sued upon is in the plaintiff, and that he is the actual party in interest, is not frivolous.

## Motion for judgment on frivolous answer.

The complaint states, as the facts constituting the plaintiff's cause of action, that Lord made a note dated July 6th, 1854, for the sum of \$1000, payable four months after its date, to the order of Searls, at the Suffolk Bank, "which said note was afterwards indorsed by the defendant E. C. Searls, and delivered to the plaintiff. The due protesting of the note, and notice thereof to Searls : and "That the plaintiffs are holders and owners of such note, and that there is due to them thereon from the defendants the sum of \$1000, for which it prays judgment.

Lord answers : 1st, that Searls did not deliver the note to the plaintiff, but to the Suffolk Bank.

2d. "That he has not any knowledge or information sufficient to form a belief whether or not the plaintiffs are the owners or holders of said note, and he therefore controverts and denies the allegations in that behalf contained in the complaint.

3d. That the plaintiffs have not legal capacity to sue, inasmuch as it does not appear in or by the said complaint that

they are a corporation or in any way or manner empowered to act or sue under the name or style of the Metropolitan Bank.

4. That the complaint does not state facts sufficient to constitute a cause of action, inasmuch as it does not appear that the plaintiffs have any legal power or capacity to own or hold the said promissory note, or any legal existence whatever. It claims the same benefit of the 3d and 4th defences, as if the defendant had demurred to the said complaint for the causes respectively set forth in said 3d and 4th defences.

The plaintiff now moves for judgment against the defendant *Lord*, on account of the *frivolousness* of his answer.

*P. U. Turney*, for plaintiff.

*Mr. Smales*, for defendant.

BOSWORTH, J.—The *third* and *fourth* defences, so called, consist, neither of denials of any allegations in the complaint, nor of any averments of new matter: the insertion of them in the answer is an attempt to demur to, as well as to answer the complaint. Neither of them, however, states objections, which would sustain a formal demurrer, assigning them as causes of demurrer. (*The Union Mutual Ins. Co. v. Osgood* 12 *Leg. Obs.* 85).

An action must be brought in the name of the real party in interest. (Code, § 111). To make title to the note, the indorsement of it by *Searls*, and a delivery of it to the plaintiffs, and that they are the holders and owners of it, are averred. It is not directly alleged that *Searls delivered it to the plaintiffs*. If the complaint can be construed as meaning that, then *that allegation* is denied, and the answer also avers, that on the contrary, it was delivered by him to the Suffolk Bank. If it does not mean that, then there is no averment that it was delivered to the plaintiffs by any one shown to have a right to deliver it, unless it be the further allegation that the plaintiffs are the owners and holders of such note. But this is put in issue by the answer. The answer denies it, in a manner allowed by the Code. The allegations made to show that the title to the note is in the plaintiffs, are controverted by the

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Shearman & The New York Central Mills.

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answer. If the issues made by the denial of these allegations should be found in favor of the defendant, the plaintiff could not recover. The answer, in this view of it, is clearly not frivolous.

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SHEARMAN & THE NEW YORK CENTRAL MILLS.

*Supreme Court, Fifth District ; General Term, January, 1855.*

PLEADING BY CORPORATION.—FRIVOLOUS ANSWERS.

Complaint against a corporation on a promissory note, made by its agent. Answer : Defendant has no knowledge or information sufficient to form a belief that it did at the time, and for the purpose stated in the complaint, by its authorized agent, make its promissory note by the name and for the amount and as is in this respect set forth in said complaint.

*Held :—*I. That it is bad pleading on the part of a corporation, or of a principal, to deny knowledge of such acts of an agent as these.

II. That this question being new, the answer should not have been stricken out as frivolous, for this defect.

III. That the answer should however be stricken out as frivolous, for violating the established rules of pleading, by denying the allegations of the complaint conjunctively.

Appeal from an order striking out answer as frivolous.

This was one of three similar actions brought against the New York Central Mills. The complaints were upon promissory notes alleged to have been executed to the plaintiffs as the payees thereof, by an agent of the defendant thereto duly authorized. They contained the usual allegation of non-payment, and demand of judgment for the amount thereof ; and were duly verified.

The defendants put in the following answer in each case, verified by a director of the company : "This defendant has no knowledge or information sufficient to form a belief that it did at the time, for that purpose stated in the complaint by its authorized agent, make its promissory note by the name and for the amount and as is in this respect set forth in said complaint, or that it is indebted to the said plaintiffs upon such a note as is in the said complaint mentioned."

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Shearman & The New York Central Mills.

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The plaintiffs moved at chambers for judgment, under section 247 of the Code, on the ground that such an answer was frivolous. The motions were granted, and an opinion rendered, entitled in the suit brought by Thorn against the New York Central Mills, which is reported in 10 *How. Pr. R.*, 19.

Mr. Justice Bacon, before whom the motion was argued, held that the pleading was bad. That a corporation was bound to know the acts of its agents as far as it would be held that an individual must of necessity have knowledge of his performance of similar acts. That the corporation were only at liberty to answer by an explicit admission or denial of the giving of the note: or must set out specially facts showing that they had not and could not obtain the information. He therefore struck out the answer as frivolous. Appeals to the general term were taken from this decision, by the defendants. The three cases were argued on the same papers, below, and on appeal.

*M. H. Throop*, for plaintiff.

*P. Gridley*, for defendants.

PRATT, J.—I. I do not think that the answer in this case, made as it was by a corporation, was sufficient under the Code, were there no objection to it in matter of form. If a corporation may answer in this manner in one case it may in all cases. It is from its nature under the necessity of acting by agents.

If therefore it were endowed with all the faculties of a natural person, it would have no actual knowledge of any facts.

It could therefore in all cases deny knowledge or information. But a corporation is an artificial being which from its nature can have no knowledge or belief on any subject, independent of the knowledge or belief of its agents. It is a mere legal entity. It neither knows nor thinks. If therefore this method of denial on the part of the corporation in this case be correct, a corporation cannot be compelled in any case to admit or deny any allegations, even those of its own organization. It cannot be possible that the legislature intended to grant to them any such dispensation.

But, again, I do not think that a natural person should be allowed to answer in this form, a similar complaint. The defendant is allowed to deny the allegations in the complaint, or any knowledge or information sufficient to form a belief. But when the acts are alleged to have been done by the defendant himself, it has frequently been held that he cannot answer in this form, and that such an answer may be stricken out.

And when the note, as in this case, is alleged to have been executed by an agent, duly authorized, it seems to me the case is not materially changed. The authority of the agent surely should be deemed within the knowledge of the principal. If there is any want of that, he may safely deny it. But if his authority be not questioned, the principal surely should be deemed to have knowledge or information of the facts alleged *sufficient to form a belief*. It is not sufficient to deny personal knowledge merely, but the defendant must deny all knowledge or information *sufficient to form a belief*.

Conceding the authority of the agent, therefore, the principal should be deemed to have all the knowledge which the agent possesses, at least sufficient to form a belief as to the existence or non-existence of the facts alleged. The principal must indeed have an extremely worthless agent, if the information which the latter should give him did not entitle it to sufficient consideration to base a belief upon it. It is true the agent might die or leave the country before he had communicated the fact to his principal, but in such a case this circumstance might be stated in the answer, and then it would present a case in which a denial of knowledge or information would be proper. But as a general rule, the principal should be deemed possessed of all the knowledge of the agent in the transaction of his business. It seems to me therefore that the right to answer in the form under consideration was not designed for such a case, and the rule applied to the allegations of facts on the personal knowledge of the party should be applied to cases of this kind. And if a natural person would have no right to plead in this form, still less should the right be extended to a corporation which must not only act by agents, but plead also by agents.

It was objected that the answer might be false, but it could not be deemed frivolous.

In the case of an answer by a corporation, falsehood could scarcely be predicated upon it. At least it might answer by some agent entitled to answer who was not acquainted with the facts, so that falsehood could not be charged against it. If, therefore, it cannot be deemed bad pleading, there is no remedy in such case. But I think the objection is not tenable. This form of answer was not designed by the Code for cases where the facts are charged to be in the defendant's personal knowledge, or where the defendant may be legally chargeable with knowledge. Take away therefore the sanction which the Code gives to that form of answer, and it will not be claimed that it would constitute any answer to the allegations in the complaint. It would be most palpably frivolous. I am of opinion therefore upon the simple question upon the sufficiency or insufficiency of the answer as a pleading, that it is bad.

II. But conceding the answer to be insufficient as a pleading, it by no means follows that it should have been held frivolous.

To authorize a judge at chambers to give judgment on account of the frivolousness of the pleading, it should be palpably bad. Section 247 of the Code, in my opinion, was only intended to apply to those pleadings so palpably frivolous, under the most obvious rules of pleading, as to raise the presumption that they were put in for the purpose of delay.

I have in my own practice adopted the rule observed by the late supreme court in regard to demurrers noted as frivolous. If the pleading is not so palpably bad as not to require an argument in support of the motion, I refuse to grant judgment upon it. The motion for judgment on account of the frivolousness of a pleading, is a very summary proceeding. There is no power given to the judge to allow an amendment, but the other party if successful, may perfect judgment at once. The manifest design of this provision of the Code is to prevent, under a pretence of pleading, unnecessary and vexatious delays. Hence in all cases when the question is doubtful upon the sufficiency of the pleading, or where the question presented is important, and has not been previously adjudicated, the motion should be denied, and the party left to his demurrer, or application to the court. Applying these rules to the present case, the answer could scarcely be held to be frivolous upon this point.

In the first place it comes within the words of the Code. Until therefore it be decided that the general language employed is subject to some restriction, we ought not to presume that the object of the party was delay merely. Secondly, Judge Bacon in his very able opinion, concedes that the question presented is an important one upon the construction of the Code, and that it has not yet been adjudicated by our courts. Thirdly, the counsel who argued the motion, manifestly did not deem the question a very clear one on his side, if his very able and learned, not to say lengthy argument, affords any indication of his views upon the question. It seems to me, therefore, that upon this point the answer should not have been held frivolous, and if there was no other objection to it as a pleading, judgment should not have been given for the plaintiff upon it.

III. But there is an objection to the answer, which, although it did not receive so much attention from the counsel upon the argument, strikes me as being somewhat formidable.

This method of answering is equivalent to a denial or traverse of the allegations of the complaint, and the denial of knowledge or information as to those allegations should be as explicit as a direct denial of them. Now it is one of the most familiar and elementary rules of pleading, that the pleader shall traverse the substantial allegations of the other party. It is not sufficient to deny them in the conjunctive form under all the particulars of time, place, and circumstance, but the material allegations, and they alone, should be put in issue. (*Stephens on Pleading*, 246; 1 *Chitty on Pleading*, 647; 11 *Paige*, 238; 8 *How. Pr. R.*, 159).

The answer in this case denies knowledge or information sufficient to form a belief that the defendant made its promissory note *as it is set out in said complaint*. It simply denies the making of the note under all the circumstances of time, place, and form, as stated in the complaint, thus leaving it entirely uncertain whether a material or immaterial issue was designed to be presented. This was palpably bad pleading under the old system of practice, when a very slight variance between the instrument set out and that proved, was fatal. For a much stronger reason would it be bad under the present practice when variances that would formerly have been



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The Canal Bank *v.* Harris.

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held fatal, are now entirely disregarded. In this respect I think the answer controverted so familiar and well settled a rule of pleading, that it was properly held frivolous.

The order at special term should therefore be affirmed.

(Decided by Hubbard, Pratt, and Bacon, J. J.)

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THE CANAL BANK *v.* HARRIS.

*Supreme Court, First District; General Term, December, 1854. (Two suits between same parties).*

## MOTIONS.—FIRST JUDICIAL DISTRICT.

The fair import of §401 of the Code is, that no motion shall be made in the First Judicial District in a cause in which the venue is laid in another district.

Motion to vacate executions in both suits.

The facts appear in the opinion.

MORRIS, J.—In both of these cases judgments were entered in this court, in the county of Albany, in the Fourth Judicial District. Executions on each of said judgments have been issued to the city and county of New York, the First Judicial District, where the plaintiff resides. The defendant applies to this court to set aside the executions, for irregularity, because they were issued after the expiration of five years since the entering of judgment, without first having obtained permission of the court. The plaintiffs object to the court in this district entertaining the motion, and claim that section 401 of the Code sustains them in the objection. The words rested upon are: "And no motion can be made in the First District in an action triable elsewhere." The fair import of those words is, that no motion shall be made in the First District in a cause in which the venue is laid in another district. The present is a motion in these two causes, and such motion can only be made in *the causes*. The title of the papers shows it is in these two causes, and the venue in each said cause is not in the First District.

Section 401 of the Code applies. This court should not entertain the motion. Motion to vacate execution to be made in the Fourth Judicial District.

THE 99 PLAINTIFFS *a.* VANDERBILT.*Supreme Court, First District ; Special Term.**New York Superior Court ; General Term.**New York Common Pleas ; Special Term.**January, 1855.*POWER OF COURT OVER ATTORNEYS.—RIGHT TO CALL FOR  
INFORMATION.

The court may compel an attorney bringing suits on behalf of a number of persons, as plaintiffs, against one defendant to disclose the names and residences of his clients.

They may also require him to exhibit his authority to bring the suits.

Order to show cause why the attorney of the plaintiffs should not furnish certain information.

There were ninety-nine suits brought in behalf of ninety-nine different plaintiffs, against the proprietor of the line of vessels known as "Vanderbilt's line for California and Nicaragua." Nineteen of these suits were brought in the Supreme Court, forty-six in the Superior Court, and thirty-four in the Common Pleas. They were all brought by the same attorney. The causes of action in the suits were alike, the same printed form of complaint being used in each case.

The complaint contained *six* counts. The ground of each action was in substance that the defendant was a common carrier, and owner of a certain line of vessels and conveyances, used in the transportation of passengers and baggage from the port of New York to the port of San Francisco in California, by the way of Nicaragua. That on the — day of —, 1852, he received the plaintiff on board of one of the vessels of said line as a passenger, to be conveyed from the city of New York to San Francisco aforesaid, for hire and reward. That it then became his duty to carefully convey him as soon as he reasonably could, without delay—furnish him with bed and accommodation, good and sufficient food, &c.—to have provided sufficient room, and not overcrowded the same. The com-

plaint then stated various violations and neglect of the obligations thus assumed, the injury and damage resulting from them, and demanded judgment for the damages.

Early in October, 1854, the defendant obtained in the Superior Court an order in the suits brought in that court, requiring the attorney for the plaintiffs to show cause as follows:

1. Why he should not furnish to the attorney of the defendant, a sworn statement, showing the Christian names in full, and the residences of the plaintiffs in the actions respectively, and specifying the state, county, and town, or village where such plaintiffs respectively resided; and if they or any of them, resided in a city, the street and number of their residence.

2. Why he should not be required to produce such plaintiffs personally in court, or to furnish proof that the plaintiff in each case is living.

3. Why he should not furnish proof of his authority to prosecute the actions, and disclose the means by which such authority was communicated; if in writing, why he should not deposit the writing with the clerk.

4. Why he should not, (in case the court should permit the actions to proceed), file security for costs in those actions in which the plaintiffs should appear to be non-residents of the State.

5. Why, (if the court should permit the actions to proceed), the complaints should not be set aside as not conformable to § 142 of the Code; or why the plaintiffs should not be compelled to elect on which of the counts or causes of action they would rely, and why the residue should not be stricken out.

6. Why the proceedings in all the actions except one, should not be stayed, until such action should be determined; and why the defendant should not have such other order as might be proper.

From the affidavits on the part of defendant on which this application was based, it appeared that the defendant was the owner of the line called Vanderbilt's line for California and Nicaragua; but was not the owner of the S. S. Lewis, the vessel by which passengers were to be carried from San Juan del Sur to San Francisco. It was between these two latter

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The ninety-nine Plaintiffs *a. Vanderbilt*.

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points that the delay complained of, took place. One D. B. Allen was however agent for the whole line, and he sold tickets to San Francisco, to passengers, at the only office of the defendant's line. Allen, as agent of the line, engaged the S. S. Lewis to sail from New York in March, 1852, to go to San Juan del Sur, and take passengers from thence to San Francisco; but she was delayed in going round Cape Horn, in consequence of which the passengers were delayed at San Juan del Sur, and obliged to betake themselves to a sailing vessel, of which Mead & Co., were agents, to take them to San Francisco. It was also stated that Mead & Co., received in payment for the passage on board their vessel, the tickets issued by Allen for the S. S. Lewis.

The affidavits also stated that some of the plaintiffs were dead,—that some of the complaints did not furnish the full Christian names of the plaintiffs, but only their initials,—that the attorney of the plaintiffs being called upon for his authority to commence these suits, declined to exhibit any except the passenger tickets for the S. S. Lewis, issued by Allen.

Mead & Co., reside at San Juan del Sur. One of that firm, however, being casually in New York, made affidavit that they authorized the suits, and did so by virtue of a verbal and written power of attorney from each of the plaintiffs, and that the written power had been burnt.

Upon the return of the order to show cause, in the Superior Court, the application was reserved to be considered at general term.

An application substantially similar was subsequently made in the Supreme Court, and also in the Common Pleas, in the suits brought in those courts.

A consultation upon the subject was had among the judges of the three courts, and they agreed in opinion that they might, and under the circumstances ought to, require the attorney of the plaintiffs to disclose the names and residences of his clients, and his authority to bring the suits. The decision to this effect was rendered early in January; and an order requiring the attorney to furnish that information, and meantime staying proceedings in the several suits until the further order of the court, was drawn up by Mr. Justice Hoffman of the

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Superior Court, and Judge Woodruff of the Common Pleas, and was made and entered in each of the suits in those two courts. This order is given in full in the opinion of Mr. Justice Hoffman, below. The order in the Supreme Court was left to be settled pursuant to the opinion rendered in that court.

*W. Silliman*, attorney for plaintiffs and of counsel.

*H. F. Clark*, attorney for defendant, and of counsel.

The following opinions were rendered in the Supreme and Superior courts upon granting the order.

**SUPREME COURT.**—**MITCHELL, J.** — (After stating the facts upon which the application was based). The right of the court to compel an attorney of the court to exhibit his authority to sue, arises from the control which it exercises over all its process and proceedings, and over its officers in order to prevent abuse. It arises from no statute, but emanates from the breast of the court, and from its desire to cause justice to be done; and as it emanates from the court, so it is to be exercised only on such terms and conditions, and in such manner as the court shall perceive will contribute to justice between the parties. The defendant cannot insist on its exercise as an absolute right, without submitting to such terms as the court may impose. He cannot insist that the action be dismissed because the power is not produced, nor that it be stayed forever unless it be produced, but in all cases must ask for the exercise of the discretion of the court, and submit accordingly to such terms as the court may choose to impose as a condition of its exercise of such discretion.

There is reason to believe that the plaintiffs' attorney has no knowledge of the plaintiffs in this action, that he has never seen them, and has never had any authority from them to sue except such as was given to Mead & Co. What the extent of that authority was, is left quite uncertain. Mead & Co. do not state even its substance; although it is burnt, they can state, and should state, according to their best recollection and their best means of obtaining information, in what precise words it was written. Then the court can judge whether it

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was an authority to sue merely for the consideration money paid for the passage from San Juan del Sur to San Francisco, or for that and also for the loss and injury to the plaintiffs, caused by the delay to which they were subjected and for the inadequate food and accommodations. These last grievances were personal to the passengers and probably could not be assigned—the first admitted of being assigned. The possession of the tickets by Mead & Co. leads to the presumption that they received the tickets (as the defendant alleges) in payment of passages furnished by them in their brig to the passengers, and under a verbal authority to recover from whoever was liable the amount paid for such tickets. Thus far Mead & Co. show a *prima facie* authority to sue in that limited way, and if they chose to confine their actions to such a claim there is no reason for staying their proceedings. The defendant shows no defence to the action, but alleges facts from which it is to be inferred that he held himself out to passengers as furnishing to them tickets which would carry them through the whole distance from New York to San Francisco, and that representation he should make good; and if Mead & Co., to save his honor, have forwarded passengers whom he contracted to forward, but by accident could not forward, he should without delay fully reimburse them, at least all that he received for the tickets for the part of the voyage which they completed in his place. Yet he has allowed more than three years to elapse and has not yet paid the money thus spent by Mead & Co. for his benefit and for the sustaining of his honor as a merchant. He therefore should submit to such terms as justice will require, and as will prevent the power of the court to stay the plaintiffs' proceedings from being abused. The power originates from a desire to prevent abuse on one side, and must be exercised with such limitations as will prevent abuse on the other side. He seems to consider it a defence that the S. S. Lewis left so shortly before these passengers left New York, that they ought to have known that they could not go by it. This would show that he knew they could not go by it, and so that he contracted to do what he knew he could not do—but the passengers cannot be presumed to know any such matters.

There is no fraud imputable to Mead & Co., or their attor-

ney, but their affidavits do not show with certainty whether the instrument executed to them was an assignment or a mere power of attorney, nor what the extent of the power was, and until that be shown they should not be allowed to use the names of these plaintiffs. If it is a mere power to sue on the ticket, they have no right to retain all the counts contained in these complaints; and then they have no power to sue even in their own names for the passengers who are dead, for the power would cease at the death of the constituent. If it is an assignment with a power, the power survives—but under our Code the suit would necessarily be in the name of the assignee, and be confined to such matters as could pass by assignment. For these reasons the very words of the instrument containing the power should be stated as nearly as practicable.

The court would not attempt in this interlocutory proceeding to prevent the Meads from suing in their own name for any cause of action, nor from suing in the names of the plaintiffs for any thing which the plaintiffs have authorized them to sue for—but it has the same right to compel them to show their authority for using a third party's name, which it has to compel an attorney of this court to show it. The attorney is called on for his authority, and refers to the Meads as his immediate constituents—that is showing no authority from the plaintiffs, until the Meads show how far they are authorized by the plaintiffs to act. If it should appear that the instrument given to the Meads was an assignment, so that the action should be in their names, the court might impose as a condition of any stay that the defendant should stipulate not to raise that as an objection, the court regulating the matter of costs as might be deemed just; it might also require the defendant to admit the facts as to his connection with this line, and require him to expedite the trial of the cause, and to put in an answer promptly, and consent to the issuing of commissions and examine witnesses without prejudice to the present motion and to the order to stay the trial; and also to consent not to object at the trial to a variance between the complaint as alleged and as it may be proved. One necessity for the numerous counts in the complaint is the uncertainty whether the proof will show the contract to be to carry from San Juan del Sur to San

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Francisco, or directly through all the distance from New York to San Francisco, and yet the difference does not affect the rights of the parties, and should not therefore be objected to at the trial. If, as has been intimated, the defendant is ready to do what is just, the whole matter may now, perhaps, be adjusted.

There are other matters moved for as to which it is unnecessary now to pass; the draft of an order for staying proceedings will be submitted to the counsel, that the plaintiffs' attorney may suggest such conditions as he may deem necessary, and the defendant's attorney may submit amendments thereto. The stay is to be until the further order of the court, so as to be under the control of the court.

SUPERIOR COURT.—OAKLEY, C. J.—(Orally).—A question presented in this case is, how far this Court can control the actions of its attorneys. Upon consideration we have come to the conclusion, both on principle and authority, that we have the power, and that it is our duty, if the case demands it, to order the attorney to disclose the residences and individualities of his clients, who they are and where they are to be found.

The defendant cannot always be aware who are his opponents. It may happen, and in this case it does, that he may be attacked by a number about whom he knows nothing. We think this power is involved in the general powers of the Court over its attorneys. We have therefore made an order,—in concurrence I may remark, with the Judges of the other Courts,—the substance of which is that the attorney by affidavit should disclose formally what he has probably disclosed in effect in the other Courts. The reasons for our decision are more fully stated in an opinion by one of the justices of the Court. The questions as to a stay of proceedings and the right of the plaintiffs to go on with the suit, may be considered hereafter.

HOFFMAN, J. (after stating the facts in the case at length).—

1. The authorities cited are decisive of the right of the court to call for the residences and occupations of the plaintiffs respec-



tively. In *Johnson v. Birley*, (5 *Barn. & Ald.*, 540), this was done in the case of an assault, where numbers were present, and the defendant could not ascertain on inquiry, who the plaintiff was. The court said that the rule had generally been confined to actions of *qui tam* and ejectment, because it is only in such cases that the defendant is generally ignorant of the plaintiff or his person. Bayley Justice said that previous to the statute of Westminster, a plaintiff appeared in person, unless he had a special writ authorizing him to appear by attorney. Then the pleadings were *ore tenus*, and a defendant had the privilege of seeing and knowing who the plaintiff was. After stating some further reasons, he says:—It is necessary, in order that both parties may have a fair trial, that the information required by this rule should be given. In *Worten v. Smith*, (6 *J. B. Moore*, 110), which was an action on the case for a libel by three plaintiffs, a rule was made absolute that the plaintiff give the particulars in writing of the places of residence and occupations of the two other plaintiffs, and in the meantime all further proceedings to be stayed. It was submitted that the knowledge was important to enable the defendant to justify or otherwise to shape his defence. See also *McRoeman v. Patrick* (4 *Howard's Miss. R.*, 533), and *West v. Houston*, (3 *Harring.* 15). The good sense of such a rule is apparent, wherever the justice of the case seems to require its application.

It is here sworn to that several of these nominal plaintiffs are dead, and facts are stated to show that some others are probably so. Again, it is not improbable that Mead & Co., of St. Juan del Sur, hold the whole or most of these tickets as beneficial owners or assignees. See affidavit of Thompson and Cross. The defendants are entitled to the names of the plaintiffs and their residences to prove this fact by their own evidence if necessary, and to show that Mead & Co. have the right to sue. Again, he has a right to such information in order to enable him to obtain security for costs from non-residents. And as it appears that many of them were forwarded by Mead & Co. from St. Juan del Sur to San Francisco by sailing vessels in 1852, the presumption is strong that some of them are non-residents. The difficulty of complying

with such a requisition in this case, forms no objection to its being made. We consider that an attorney who sues in a court, is bound to know the place of residence and occupation of his client, that it may be disclosed if the rights of the defendant require it. This part of the application must be granted.

2. The next branch of the motion relates to the exhibition by the attorney of his authority to sue in the names of these numerous plaintiffs. It is true that in general the authority of an attorney is to be presumed from his appearing on the record. And the statute has only expressly provided for the production of his power in cases of ejectment. (2 *Rev. Stats.* 4 ed. 567, § 12).

But the present case is very peculiar. Upon the affidavit produced by the defendant, it is made out that certainly many of these passage tickets have been transferred to Mead & Co., and are, perhaps, owned by them. The right of action to all such is, it may be assumed, vested in that firm. A single suit, then, in their name, for all such tickets would be the proper and the only action which could be sustained, to such extent as any right of action was assignable. It appears by the affidavits produced by the plaintiffs' attorney, since the argument of this motion, and agreed to be used by us, that a power or powers of attorney, were executed by a number of the plaintiffs to Mead & Co., authorizing them to employ attorneys and counsel for the purpose of enforcing their claims. It is alleged that this power has been burnt. It is not alleged that a draft or copy is not in existence, nor that the parties cannot give a satisfactory statement of its general contents. If the draft or copy was directed to the attorney, no doubt the court would ask for its production. The case cannot be varied, where it is an authority to another, to employ the attorney. In various cases the undoubted right of the court to call for an exhibition of the power of an attorney is declared. In a few it is considered as an absolute unqualified right of the defendant. Thus, in *Clark v. Holliday*, (9 *Miss. R.*, 711), it was held that the court would inquire, whenever requested, into the authority of an attorney to appear. The court in Tennessee recognized the same rule in *Gillespie's case*, (3 *Yerger*, 325). In *McAlexan-*

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der *v. Wright*, (3 *Monroe's R.*, 194), it was so far qualified as to impose upon the defendant the task of showing that his rights might be jeopardized, unless it was observed. The general power was recognized in *Allen v. Green*, (*Bailey's R.*, *S. Car.*, 448). See also *Cantwell v. Merrifee*, (2 *Pike R.*, 355), and *West v. Houston*, (3 *Harring.*, 15). In 5 *Halstead*, 251, it was held that it was not the proper subject of a plea that the attorney had no authority to prosecute the suit. The proper mode was by motion to the court to stay proceedings. It seems to be the settled law in England that if a plaintiff questions the attorney's power to sue for him, and makes an affidavit denying it, nothing but a written authority will suffice. (*Maries v. Maries*, 23 *Eng. Law & Eq. R.* 22; *Allen v. Bone*, 4 *Beavan*, 493). We consider the circumstances of this case as calling upon the court to exercise its power to require the best and most perfect exhibition of the power under which he acts, that can be given, the original authority under which his authority is derived, being lost.

The order will be as follows :

Upon reading and filing the order to show cause herein, and the affidavits of the defendant and William K. Thorne and others, submitted on the part of the defendant, and also the affidavits of William Silliman, Esq. and William H. Mead, submitted on the part of the plaintiffs respectively, and also upon reading the several complaints of the said respective plaintiffs, and on hearing of counsel in behalf of the parties respectively—it is, on motion of Horace F. Clarke, Esq., of counsel for defendant, ordered,

That the attorney for the plaintiff, in the several above entitled causes, furnish in writing and verified by oath, to the attorney for the defendant, the names and present places of residences of the said plaintiffs respectively, in the manner and to the extent specified in the order to show cause; that is to say, with the christian names of the plaintiffs in each of said causes in which such christian name is not stated in the complaints respectively, and specifying the State, county, town and village where each of the plaintiffs respectively resides, and if they, or any or either of them, reside in a city, then

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giving the street and number of such residence, and also specifying the occupation of the plaintiffs respectively.

And it is further ordered, that the said attorney for the plaintiffs in the said above entitled suits do also deliver to the attorney for the defendant a sworn copy of the power of attorney under or in pursuance of which the said suits are alleged to be instituted, mentioned in the said affidavit of William H. Mead so read and filed on the behalf of the said plaintiffs upon this motion, and therein stated to have been executed by the said several plaintiffs to the said Mead, if the draft or any copy of the said power of attorney or written authority is in existence, and if not, then that he deliver a statement, verified by oath, of the substantial contents, extent, purport and effect of the same, and of the powers conferred therein, and the consideration expressed therein or upon which the same purported to be given, the interest, if any, thereby given or purported to be given to the said Mead, or to Mead & Co., and for whose use and benefit the suits alleged to have been thereby authorized were to be prosecuted, and at whose risk, cost and expense, so far as such particulars or any or either of them were contained in such power of attorney or written authority, and as nearly in the words of the said power as he may be able to furnish the same, or as may be practicable.

And all proceedings in the said several suits are hereby stayed until the further order of this court, with leave to either party to apply to the court for further or other relief, as he may be advised.

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DRAKE v. COCKROFT.

*New York Common Pleas ; General Term, January, 1855.*

IRRELEVANT DEFENCES.—COUNTER-CLAIM.

An answer which, without denying any fact stated in the complaint, merely says that, "the defendant denies that the plaintiff is entitled to the money demanded," will be struck out on motion.

In an action by a landlord to recover rent, the tenant cannot set up as a counter-claim a mere trespass upon the demised premises, and destruction of personal property, committed by the landlord.

*Quere.*—Whether in actions at law the Code has extended the doctrine of recoupment to any cases to which it did not previously apply.

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Drake & Cockroft.

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Appeal from an order at special term, striking out parts of an answer.

*H. Scovell*, for appellant.

*W. Lowerre*, for respondent.

WOODRUFF, J.—The complaint herein avers that the plaintiff on, &c., let the defendant, and the defendant hired and took from the plaintiff certain premises for the term of one year, from the first of May then next at the yearly rent of \$925, payable as follows: \$308.33 on the first day of August, 1853; \$308.33 on the first of November, 1853, and the balance \$308.34 on the first day of February, 1854.

After setting forth other provisions of the lease not material to this appeal, the complaint further avers that the defendant promised to make punctual payment of the said rent in the manner above mentioned, and that the defendant entered into possession of the demised premises under and by virtue of the said hiring, and continued in the possession, &c. until after the first day of February, 1854. That on the first day of August, 1853, the said sum of \$308.33 became due and payable according to the tenor of the said letting and hiring, and that the sum of \$8.33 thereof is now due and owing. That on the first of November, 1853, the other sum of \$308.33 became due and payable according to the tenor, &c., and that the sum of \$8.33 is now due and owing, and the said balance of \$308.34 became due and payable on the first day of February, 1854, and the whole thereof is now due and payable. Whereupon the plaintiff demands judgment for \$325, and interest and costs. To which complaint the defendant by answer sets up or attempts to set up three distinct defences.

For a *first* and distinct defence, the defendant answers that he "*denies* that the said plaintiff *is entitled* to the sum of money demanded in this action or any part thereof."

Reading this supposed "defence" in connection with the legal principle that "every material allegation in the complaint which is not controverted by the answer, shall be taken as true for the purpose of the action," this so called defence amounts to this; "although I hired the plaintiff's premises for

the period stated, and agreed to pay the rent specified, and occupied the premises during the term, and the rent became due and payable according to the tenor of the hiring, and is now due and owing, still the plaintiff is not entitled to such rent." Or in another form, "although all the facts alleged by the plaintiff are true, still he is not entitled to recover."

I fully concur in the opinion of the first judge at special term, that this is no defence at all. If the facts stated by the plaintiff are true, the plaintiff *is entitled* to the sum of money demanded, and this so called first defence is a mere legal falsehood, unless other facts exist which are not stated.

I need not state the elementary rule of pleading, that a plea or answer which does not deny the facts alleged by the plaintiff must state *facts*, which if proved, destroy the legal inference that the plaintiff is entitled to recover. If the allegations of the plaintiff are sufficient in law to entitle him to recover, the defendant cannot dispute the right of recovery while he admits the facts stated, unless he avers new facts which defeat their otherwise legal operation.

The defendant's counsel on the argument of the appeal, insists that a denial of the plaintiff's right to recover, or a statement that the plaintiff is not entitled to the money, is a statement of a fact. In this I apprehend he overlooks the distinction which often exists between the statement of a truth and an allegation of a fact. Indeed the terms fact and truth are often used in common parlance as synonymous; but as employed in reference to pleading, they are widely different. A fact, in pleading, is a circumstance, act, event or incident; a truth, is the legal principle which declares or governs the facts and their operation and effect.\*

Admitting the *facts* stated in a complaint, the *truth* may be that the plaintiff is not entitled upon the face of his complaint, to what he claims. The mode in which a defendant sets up that truth for his protection, is a demurrer.

So also, admitting the facts stated in a complaint, the *truth* may still be that *by reason of the existence of facts which are not disclosed by the complaint*, the plaintiff is not entitled to

\* For another view of this distinction, see *Lawrence v. Wright*, 2 Duer, 673.

what he claims. If a defendant wishes to urge this condition of things, he must do it by averring the existence of those facts.

It seemed to me so obvious that this denial of the plaintiff's title to recover, contains nothing which can be called a statement of a fact, that no language could make it more plain; but counsel for the appellant have deemed it doubtful, and pressed it upon our further consideration. The case cited by him (*Allen v. Patterson*, 3 *Seld.* 476), does not even tend to sustain such an answer. An averment in a complaint that the defendant was indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant at his request on a day named, and at a place stated, and that a sum named is due to the plaintiff from the defendant was held to import, and therefore in substance to be, an averment that at the time and place stated the plaintiff sold and delivered to the defendant the goods referred to, and the court in that case distinctly recognized the duty of a pleader distinctly to aver or state every *fact* on which he relies to support the legal proposition upon which his right to maintain or defend the suit, is dependent.

For a second and distinct defence the defendant sets up what the pleader, (as if himself in some doubt by what name it can properly be called), terms a claim to an allowance of the "*amount or value*" of certain *personal property* "by way of counter-claim, recoupment or set off." And this claim is founded upon allegations that the defendant simultaneously with and as a part and parcel of the same hiring mentioned in the complaint, hired from the plaintiff, and held, used and occupied a certain stable and lot of ground adjoining the premises described therein—and that the plaintiff during the defendant's temporary absence, broke open the stable and wilfully took and removed the personal property of the defendant therefrom, and the same has been injured, destroyed and lost to the defendant. What the property consisted of, or how much is its value, is not stated.

If I thought it doubtful whether the matter thus pleaded as a second defence did or did not constitute a valid counter-claim in this action, I should not hesitate to say that it ought

not to have been struck out on motion, and that the plaintiff should have been left to his demurrer. In this respect I assent to the argument urged by the counsel for the appellant and to the authorities cited by him that questions of doubt ought not to be disposed of in this summary manner when a demurrer is the appropriate mode of trying them. But I can find no reason for any doubt upon the subject. The answer sets up a mere trespass by the landlord by taking, injuring and destroying certain *personal property* which was upon a portion of the demised premises.

It is not claimed by the counsel for the appellant that such a trespass could be set up, before the adoption of our Code, as a defence to an action by the landlord for the rent. But it is insisted that the counter-claim authorized by the Code includes the damages sustained by the tenant from such a trespass.

The counter-claims which the Code authorizes are defined :

1st. A cause of action *arising out of* the contract or transaction set forth in the plaintiff's complaint *as the foundation* of the plaintiff's claim, or connected with the subject of the action.

2d. In an action arising on contract, any other cause of action *arising also on contract, &c.*

A trespass upon real or personal property is not a cause of action arising on contract. The second cause above cited clearly does not authorize such a defence in an action upon contract, and the present is an action upon the contract of hiring.

Does the first definition or explanation of the term counter-claim embrace the matter set up in this answer ?

Obviously it does not, unless the cause of action set up in the answer arises out of the contract set forth in the plaintiff's complaint, or is connected with the subject of the plaintiff's action.

The answer sets up a trespass by the landlord upon the demised premises and the destruction of the defendant's goods. It does not even claim damages for the entry or for any injury to the possession, but only for the *personal property* destroyed. The contract set forth by the plaintiff is a letting and hiring and agreement by the defendant to pay the rent. The trespass



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averred does not *arise out of any* contract. The liability of the plaintiff for the trespass does not result from that contract, nor is it affected by it. As a *cause of action* it is wholly independent of that contract, and the liability therefore exists to the same extent and is neither less nor greater than if the trespass had been committed upon any other premises in the occupation of the defendant. The landlord is no more liable for the trespass than for the like trespass committed elsewhere.

Nor is the trespass connected with the subject of the action. Here the subject of the action is *rent* or money due upon the contract of hiring—the compensation for the use and occupation. The use and occupation have not been interfered with. They have continued without interruption. An interference with the possession, an eviction total or partial, an unlawful injury to the premises in violation of the agreement of letting, would have given the defendant a claim for damages which upon a liberal construction of the language of the Code might have been connected with the subject of the action so as to constitute a counter-claim. But a mere trespass is, in my opinion, no more connected with the subject of an action brought for the rent than an assault and battery of the tenant by the landlord would be.

I can find no more ground for saying that such a trespass can be set up as a defence to an action for rent now than before the Code was enacted. The provisions of the Code above referred to were designed to affirm the right of a defendant to recover his damages in those cases in which a recoupment was proper before the Code was enacted. (See *Reab v. McAllister*, 8 *Wend.*, 109, and *Batterman v. Pierce*, 3 *Hill*, 191).

If the Code extends the right to any other cases not within the law of set-off (which I doubt), they are not such as is exhibited by the answer in question.

In my opinion the order striking out what are termed in the answer the first and second defences, should be affirmed.

## GREGORY a. TRAINER.

*New York Common Pleas ; General Term, January, 1855.*

## PLEADING.—EFFECT OF PLEA OF SET-OFF.

The rule of the old system of pleading, that a special plea admits the matters stated in the declaration, is applicable to pleadings under the Code.

Where the defendant, in a justice's court, did not deny the plaintiff's claim, but merely alleged a set-off which was not proven on the trial ;—*held*, that judgment should have been rendered for the plaintiff.

Appeal from a judgment of the Sixth District Court.

The plaintiff claimed \$13 damages, and the defendant pleaded a set-off. Neither party offered any testimony, and the justice rendered judgment for the defendant. The plaintiff appealed.

*J. D. Sherwood*, for appellant, cited *Code* § 53—§ 64, especially subd. 1 to 8 and 15, § 168, *Young v. Moore*, 2 *C. R.*, 143 ; *De Courcy v. Spalding*, 3 *C. R.*, 16.

*J. Molony*, for respondent. The plaintiff must prove something before the defendant is obliged to enter into any proofs at all. If he does not put in some proof he is clearly out of court.

INGRAHAM, F. J.—The complaint in this case was for damages to the plaintiff's property, amounting to \$13.

The defendant's answer was a set-off, but what the set-off was, or what the amount of it was, does not appear.

Neither party offered any testimony, and the justice nonsuited the plaintiff.

Under the former system of pleading, a special plea always admitted the matters contained in the declaration, and the rule is still applicable to pleadings under the Code.

The plaintiff claimed to recover for damages to his property, which claim was not denied by the defendant, but he relied in his answer on a set-off. The effect of these pleadings was to admit the plaintiff's claim, and leave to the defendant the

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Stewart's Case.

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proof of his set-off. For want of such proof, the justice should have rendered judgment against the defendant for \$13.

The judgment rendered in this case by the justice cannot be sustained.

Judgment reversed, and judgment ordered for plaintiff for \$13 and costs.

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STEWART'S CASE.

*New-York Common Pleas; In Chambers, January, 1855.*

COMMITMENT FOR VAGRANCY.—RECORD, HOW FILED.—HABEAS CORPUS.

Proceedings prior to a commitment for vagrancy cannot be reviewed on *Habeas Corpus*, if that commitment is regular, and the record of conviction is properly made and filed.

Where the record of conviction should be filed.

*Habeas Corpus* directed to the keeper of the penitentiary, directing him to bring the body of Sarah Stewart before the Judge.

The return showed that the prisoner was detained by virtue of a commitment by Justice Connelly, on conviction of being a prostitute, and therefore a vagrant.

It appeared on the hearing by a certificate of the county clerk, that no record of conviction had been filed with that officer, and it also appeared that the record of conviction had been filed with the clerk of the sessions.

*E. Blankman*, for the petitioner, applied for the discharge of the prisoner, upon the ground that the statute defining who were vagrants, (2 *R. S.* 4th ed., 34), did not include prostitutes, but they were disorderly persons, under the provisions of the act, (2 *R. S.*, 4th ed., 53), and in such cases, that the record of conviction could only be filed with the county clerk.

INGRAHAM, F. J.—Sarah Stewart is brought before me on *habeas corpus*, and is alleged to be unlawfully detained in the penitentiary. The return shows that she was committed as a

vagrant by Justice Connelly on the 16th January instant, for the period of three months, he having tried her upon a charge made against her, and convicted her of being a vagrant, on competent testimony of Daniel Carpenter, captain of fifth ward police, and that he had made and filed the record of conviction in the office of the clerk of the Court of Sessions.

Under this proceeding, if the commitment is regular on its face and the record of conviction is properly made and filed, I cannot review the decision of the magistrate. That can only be done by the Supreme Court, on *certiorari*.

The certificate of the county clerk is furnished that no record of conviction was filed there, and a copy of the record as filed with the clerk of the Sessions is also produced.

It is contended by the petitioner's counsel that the record of conviction should have been filed with the county clerk, and not with the clerk of Sessions; that the charge against the prisoner of being a prostitute, as stated in the commitment, did not warrant a conviction of vagrancy, but of being a disorderly person; and that in such cases the statute requires the record to be filed with the county clerk. There is some confusion in the different statutes, which without careful examination, may lead to error.

By the statute as to vagrants, (2 *Rev. Stats.*, 4 *ed.* 34), certain persons are declared to be vagrants, and upon conviction by a magistrate, may be sentenced to the penitentiary, and the record of conviction is to be filed in the office of the clerk of the county. But in the enumeration of offences which may be tried under this chapter, the one of which this person is convicted, (being a prostitute) is not enumerated.

By the statute as to disorderly persons, (2 *Rev. Stats.*, 4 *ed.*, 53), a similar provision is made as to other offences, and the record of conviction is directed to be filed in the office of the clerk of the county. Under this class of offences, is enumerated that of being a common prostitute.

In 1853 a statute was passed prescribing the form of the record, and directing that in all cases of conviction for vagrancy, the record of conviction shall be filed with the clerk

of the Sessions. The record in this case is substantially that prescribed by this statute. (*Laws of 1853, 853*).

It is urged that this statute does not apply to the chapter of the Revised Statutes relative to disorderly persons, and therefore the record of conviction should in such cases still be filed with the county clerk. This is so in regard to all offences which come under this description. But there is another statute which has been often overlooked, but which relieves this case from any difficulty upon this point.

By the statute relative to the powers of the common council, &c., passed January, 1833, (*Laws of 1833, 9 ch. 11*), habitual drunkards, common prostitutes and others are declared to be deemed vagrants, and if the magistrate, on complaint before him, is satisfied by competent testimony that any person is a vagrant within the description therein stated, he is directed to make up and sign a record of conviction, which shall be filed in the office of the clerk of the Court of Sessions, and he shall by warrant commit such vagrant—if the offender be an improper person to go to the almshouse—to the penitentiary, for any time not exceeding six months.

The proceedings in this case are, therefore, regular and in accordance with the provisions of the last recited statute, without reference to the act of 1853. And as by this act the offence charged is declared to be that of vagrancy, the provisions of the act of 1853 are also applicable to this class of cases, and the prescribed form of the record of conviction by that act is proper and sufficient for all offences embraced in the 12th section of the act of 1833. The record of conviction and the commitment are, therefore, regular and in compliance with the statute.

If the allegations contained in the petition are true, injustice may have been done to the prisoner. It is there alleged that she was prohibited from producing witnesses on her own behalf, and from cross-examining witnesses produced against her, and that she is innocent of the charge made against her; but the guilt or innocence of the prisoner cannot be inquired into upon *habeas corpus* after conviction. If there is any remedy—and that there should be one no one can doubt—it is

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by the Supreme Court on *certiorari*. I have no power in this proceeding to review the correctness of the decision of the magistrate.

The prisoner must be remanded and the writ discharged.\*

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LA CHAISE *a.* LORD.

*New York Common Pleas ; Special Term, January, 1855.*

**SPECIAL PARTNERSHIP.—RIGHTS OF CREDITORS.—APPOINTMENT OF RECEIVER.**

Where an action was brought on behalf of one firm out of a large number of creditors of an insolvent firm, and was brought not only against the general partners of the firm, but also against a special partner who denied his indebtedness :—  
*Held*, that an application for an injunction and the appointment of a receiver must be denied.

To warrant the granting of such an application ;—

It should be made in behalf of all creditors of the insolvent firm who will unite therein ;—

And all the defendants sought to be made liable as partners, should admit the indebtedness.

Application for an injunction, and appointment of receiver.

This action was brought by La Chaise and Fanché, against Lord, Brown and Marks. The facts out of which the action arose appear in the opinion.

*C. Bainbridge Smith*, for plaintiffs.

*D. Lord and John B. Stevens*, for defendants Lord and Brown.

*Benedict, Boardman and Huntington*, for defendant Marks.

INGRAHAM, F. J.—The plaintiffs, being creditors of Lord and Brown, move for an injunction against the partnership property, and a receiver. The complaint shows the indebtedness of the firm of Lord & Brown to the plaintiffs, upon a note of \$1,073 50 ; that Lord & Brown formed a limited partnership in December, 1850, to continue five years, and that the other defendant, Marks, was the special partner, having advanced

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\* The prisoner was afterwards discharged by the Supreme Court on *certiorari*—for defect in the evidence before the justice.

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\$20,000 thereto, that during the existence of the partnership, Marks withdrew from the funds of the firm \$18,339 80, and about the 1st of July, 1854, received from the firm their notes for \$17,100; that at about that time the firm served upon their creditors a notice of the dissolution of the limited partnership; that at the time Marks received such sums of money from the firm they were insolvent, and that such moneys were transferred in contemplation of insolvency; that the firm of Lord & Brown is now insolvent and wholly unable to pay their debts, and have now in possession several thousand dollars of assets of said partnership, out of which they are paying debts, and giving preferences over the debt due to the plaintiffs. The defendants, Lord & Brown, do not deny the indebtedness to the plaintiffs. They admit the insolvency of the firm, and that they have in their possession some of the assets of the firm. They explain the moneys paid to Marks to have been dividends of profits, which they allege to have been made in good faith, and after allowance for all losses sustained at the times of such dividends for the years 1851, '52 and '53; and aver that such dividends were made from the net profits. They also aver that at the time of the dissolution in July, 1854, they believed the firm to have been solvent. That on such dissolution they bought from defendant, Marks, his interest in the assets of the firm as special partner, for which the notes of Lord & Brown were given, payable after all the liabilities of the special partnership should have been matured. That Lord & Brown as general partners, bought the assets of the firm of Lord & Brown (the limited partnership) which were duly transferred to them, and they incurred a liability for said purchase of \$140,000, of which they have since paid \$75,000. That Lord & Brown thereupon formed a new general copartnership in which Marks had no interest. That such new firm failed in November, 1854, and that there is now due to the creditors of the limited partnership \$65,000, and of the general partnership \$115,000. They also allege the pendency of another action in this court by Lottimer and others in behalf of all the creditors of such limited partnership, praying for an injunction and receiver, prior to the commencement of this action.

If this action had been by the plaintiffs as creditors of Lord & Brown, on behalf of all the creditors of the limited partnership, and Marks had not been sought to be charged as a general partner, I think the facts appearing before me would have been sufficient to warrant the granting of this motion. The firm is admitted now to be insolvent, owing about \$65,000, and by a proceeding to which but little value can be attached so far as the claims of creditors are concerned, all the assets of the firm of Lord & Brown, the limited partnership, have been sold to Lord & Brown, the general partners, and as appears from the evidence, in consideration of their agreeing to pay all the liabilities of the limited partnership, amounting to \$140,000. Had such liabilities been discharged at maturity, none of the creditors would have had any cause of complaint against the arrangement, but when debts to the amount of \$65,000 are left unpaid, the creditors may well claim as void a sale of the whole assets of the firm by the partners, to themselves, when they are told they have no claim upon such assets, and must rely upon the individual liability of Lord & Brown, the members of the general partnership, to whom they claim such assets belong. No such arrangement can be sustained to deprive the creditors of the limited partnership of their right to insist that the assets of that firm shall be applied to the payment of its debts, and although the defendants may have gone on and paid, with borrowed money, some of their liabilities, there is nothing in that fact to justify them in withholding from such creditors the assets still remaining in their hands, and which under any circumstances should be applied in discharge of the liabilities of the limited partnership. That such a transfer between the same parties can be sanctioned as depriving creditors of their right to follow the assets of the firm for the discharge of its debts, seems to me inconsistent with every principle of justice or equity. It may be, that upon a dissolution of a firm, one partner may sell to the other partner all his interest in the assets of the firm, and that if such transaction is *bona fide*, and for the purpose of winding up the affairs of the firm, a creditor cannot take such property from liens obtained against it by the creditors of the partner making the purchase.



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La Chaise a. Lord.

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*Ketchum v. Durkee*, 1 *Barb. Ch. R.* 480). But this doctrine cannot be extended to such a case as the present one, and I doubt whether it can be in any case of limited partnership.

The right to grant such motion was settled in the case of *Inness v. Lansing*, (7 *Paige*, 584), and has been since followed by the supreme court, in *Whitewright v. Stimpson*, 2 *Barb. S. C. R.* 379, and the rule adopted in those cases as to limited partnerships was extended by Judge Edmonds to a general partnership, in *Dillon v. Horn*, (5 *How. P. R. R.*, 35). Whether the decision in the latter case can be sustained it is not necessary now to decide. And when it appears that a disposition was made, or to be made, of the assets, in giving a preference to one creditor over another in view of insolvency, the provisions of the 219th section of the Code are comprehensive enough to warrant such a proceeding.

In the cases, however, to which I have referred, the action was commenced not for the benefit of the plaintiffs solely, but of all the creditors of the insolvent firm. The appointment of a receiver in those cases would have secured the partnership funds and assets for the joint benefit of all, and upon a distribution of such assets, the creditors would have been entitled equally to share in the proceeds thereof. There is a manifest propriety in requiring such a form of action before the property of the firm should thus be placed in the hands of the receiver. There is no equity in taking from a firm the whole of their property to pay or secure one individual creditor to the exclusion of others. The impropriety of thus placing in the hands of a receiver the whole of the assets of the firm to pay a claim of \$1000, and thereby depriving other creditors having claims amounting to \$64,000, of any proceedings against such assets until the first creditor is paid, is so manifest that it can require no argument to show that it ought not to be done. Even if the plaintiffs were judgment creditors, they could only have an order allowing a receiver to take sufficient of the assets of the firm to obtain the means of discharging their debt; and until they are judgment creditors there is no propriety in giving them a receiver, unless in a case where the effect of such receivership will operate to secure all the creditors of the firm.

I think, also, there is a difficulty in the present action which

forms an objection to the granting of this motion. It should be required, to warrant such an order, that all the defendants sought to be made liable as partners, admit the indebtedness. The defendant Marks (to whose answer I have not before referred, denied such indebtedness. He denies any joint indebtedness whatever, and does not admit the plaintiff's claims. If he is sought to be held liable as a defendant, he certainly does not admit the indebtedness; but, on the contrary, his answer shows a statement of facts which would, if proved, entitle him to a verdict. Besides, other creditors might not, even if the action had been commenced for all the creditors, have been willing to engage in such a contest.

It is not necessary for me to pass upon the questions argued before me as to the liability of Marks. His liability is denied. If it exists it is not admitted, so as to warrant me in granting this motion. If he is not liable, it can only be decided at the end of a protracted litigation, and the funds and assets of an insolvent firm should not be tied up from all the creditors for the purpose of enabling one creditor to enter into such a controversy. The granting of an injunction and appointing of a receiver in cases of this kind is admitted by the chancellor to be an addition to the former powers of a court of equity, and it seems to me to be proper that the power should only be exercised where the claim is undisputed, and where the property will as speedily as possible be applied to the use of the creditors.

An objection was made upon the argument, and it appears in the defendant's answer, that another action is pending in this court for the benefit of all the creditors, and that such action was commenced prior to the present one. The mere existence of such an action, although a prior one, has no effect upon this motion. Whether prior or subsequent in its commencement, it affords no ground to stay proceedings in other actions, until after a judgment has been rendered in a case in which the other creditors can combine and make themselves parties. After such a judgment a motion could formerly be made to stay proceedings in other suits, so far as relates to the appointment of a receiver. This was settled by the chancellor in *Inness v. Lansing*, before referred to. (7 *Paige*, 583).

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This motion must be denied, with \$10 costs, and the temporary injunction dissolved, without prejudice to the renewal of it, if the plaintiffs shall by amendment obviate the objections which now exist, as above stated.

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SOUTHWELL *a.* MARRYATT.

*New York Common Pleas ; Special Term, January, 1855.*

VACATING JUDGMENT.—DEFECTIVE SERVICE OF SUMMONS.

Where it appears that a defendant has endeavored to avoid the service of the summons, the court, on a motion to vacate the judgment for non-service of the summons, will require the defendant to furnish *satisfactory evidence* that he was not served.

Motion to set aside judgment.

After judgment had been entered and execution issued in this case, the defendant asked leave of the plaintiff's attorney to be let in to defend, alleging that he had never been served with any copy of the summons and complaint, that he had a good defence and also a counter-claim.

The plaintiff's attorney consented to receive an answer, provided the counter-claim was not a purchased demand, on the defendant's giving security for the debt, and serving an answer showing the dates, particulars, and all the circumstances of the alleged counter-claim, and consenting to a reference. The defendant refused to accede to these conditions and now moved to set aside the judgment upon a verified answer, an affidavit of merits and affidavits showing that the defendant had never been served with summons and complaint.

By the affidavit read in opposition to the motion, it appeared that the plaintiff's attorney had found great difficulty in serving the summons and complaint on the defendant. That after making ineffectual attempts for some months to serve him, he learned in October, 1854, that he was working in a printing establishment in Frankfort-street. He thereupon sent the summons and complaint round by his clerk to be served. The

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Southwell *a.* Marryatt.

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clerk however did not know the defendant, but served the papers on a person whom he supposed to be the defendant. On returning to the office and describing to the attorney the person served, the attorney thought a mistake had been made, and went to the place in Frankfort-street with his clerk. He then found the defendant, but discovered that the papers were in possession of a man by the name of Blowers, who, however agreed to give them up. While the attorney was talking with Blowers, Marryatt, the defendant, started off. The attorney followed him, but Marryatt was the fleetest, and escaped from the attorney, and the attorney was unable to make the service at that time.

It also appeared that another clerk of the plaintiff's attorney had served the summons and complaint on some one answering the description which had been given him of the defendant, but who was not personally known to him.

*H. Brewster*, for plaintiff.

*Allen, Hall and Stocker*, for defendant.

INGRAHAM, F. J.—Although the proof of service of the summons on the defendant is not of that conclusive character that it ought to be, yet the conduct of the defendant as disclosed in these affidavits, is such as to justify the court on a motion to set aside the judgment, in requiring satisfactory proof that the affidavit of service was untrue. The defendant after he had knowledge of the erroneous service of the summons on his foreman, and when requested to wait till it could be procured from the foreman, who was then present, so that it could be served on him, not only immediately departed, but endeavored to avoid the service and to conceal himself from the plaintiff's attorney. I cannot resist the conclusion that throughout, there has been on the part of the defendant, a constant endeavor to avoid the service of process in this case; and I am not satisfied that it was not served on the defendant.

As the defendant has sworn to merits, and the service of summons is involved in doubt, the defendant is permitted to answer within five days upon serving with his answer a consent to refer the case to a referee. If the parties do not agree

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Meyers *a.* Trimble.

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on such referee, either party may on two days notice, apply to the court to name such referee. The judgment to remain as security, and the costs of the judgment and \$10 costs of this motion to abide the event.

If defendant does not accede to these terms, the motion is denied, with \$10 costs.

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MEYERS *a.* TRIMBLE.

*New York Common Pleas ; Special Term, January, 1855 ;  
Again, February, 1855.*

ADMISSION OF PART OF PLAINTIFF'S CLAIM.—SATISFACTION.

- I. Where defendant by answer admits a part of plaintiff's claim to be just, an order requiring him to satisfy such part, will be made in the Common Pleas, notwithstanding that the defendant has made an offer in writing to allow the plaintiff to take judgment for the sum admitted to be due.
- II. Such an order will be enforced by attachment, if necessary.

I. *January.*—Motion that defendant be required to satisfy a part of plaintiff's claim, admitted by his answer to be just.

No defence was made to the complaint in this action, but a counter-claim was interposed, leaving however a balance due to the plaintiffs of \$310. The defendant offered to let the plaintiff take judgment for that amount.

The plaintiff however moved under § 244 of the Code for an order directing the defendants to pay the amount admitted to be due.

*A. Mathews*, for the motion.

*Meeks & Waite*, opposed.

INGRAHAM, F. J.—The defendants by their answer, do not deny the plaintiff's claim, but set up, as a counter-claim, moneys due to him, leaving a balance due from the defendants exceeding three hundred dollars. To this there is no defence pretended, and under any circumstances the plaintiff would be entitled to recover that amount. The defendants have also offered to permit the plaintiff to take judgment for the same sum.

The plaintiff now moves for an order directing the defendant to pay the amount admitted to be due.

It would be necessary, before such an order could be made, to ascertain clearly that the defendant made no defence to that portion of the claim, and when that is established, there can be no cause why the defendants should not be required to make payment. If the defendants have a counter-claim to the plaintiff's demand, sufficient remains to protect them in case of a recovery. Any other rule would enable a defendant, by setting up a counter-claim for a small amount, to deprive his creditor for a long time of his rights, to which in reality no defence existed.

It was said the Superior Court had decided otherwise, in *Dolan v. Petty*, (4 *Sand. S. C. R.* 673), but in that case there was not a distinct admission of a balance being due, and the discretion of the court was properly exercised in refusing that motion.\* A case recently decided was also referred to; but as the same has not been submitted to me, I am unable to see whether it is applicable to this motion or not.

It was also suggested that there was difficulty in enforcing such an order, and, therefore, it should be refused; but such a reason is not a good one to warrant us in refusing to make it. If the order cannot be enforced, the defendants will reap the benefit of the defect in the law. No difficulty however, need be anticipated on that part of the proceeding.

I see no reason for refusing the motion. The same is granted.

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## II. *February*.—Motion in the same case for an attachment.

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\* In *Smith v. Olssen*, (4 *Sand.* 711), *Dunn, J.*, on advisement with all the justices of the Superior Court, laid down the general rule, that that court will not make any order for payment by the defendant under the last clause of subdivision five of section 244 of the Code upon his admission in the answer, where it is made to appear that the defendant has, *previous to answering*, made to the plaintiffs an offer in writing, allowing him to take judgment for the sum admitted to be due by the answer, as prescribed in section 385. In the present case the offer was served Dec. 7, 1864. The answer was verified on the same day; but whether the offer, or answer was first served, does not appear, from the motion papers.

The case referred to as "recently decided," in the same court, was, we believe, that above stated.

The defendant having for more than twenty days neglected to obey the order of Ingraham, J., above mentioned, the plaintiff moved for an attachment to enforce his obedience to it.

*A. Matthews*, for the motion. An attachment is a provisional remedy, within the meaning of section 244.

*A. Waite*, opposed. If an order like this can be enforced by attachment, it is done in direct contravention of the statute abolishing imprisonment for debt. The court should not enforce by attachment, the payment of a mere debt, but should confine that remedy to cases where its use is necessary in order to reach a specific fund; and to cases of fraud, trust, and the like. If we are honest enough to admit that a sum is due, then by the plaintiff's argument, we are to be imprisoned if we have not the means of paying it; whereas if we had denied it, or let the case go by default, we could never have been imprisoned. Both the statutes are to be taken together; and section 244 is to be construed in favor of liberty. The plaintiff may enforce this payment by execution on final judgment.

[DALY, J.—That is not enforcing it as a provisional remedy.]

The Code points out those cases in which a party may be arrested; and in no part of its provisions does it contemplate that the humane provisions of the act of 1821, shall be abrogated. It was never intended that a plaintiff should have any other right than to issue execution against the property of a debtor, to enforce the payment of a mere debt.

*Matthews*.—The Code has been passed since the act of 1821, and governs its construction. The answer admits a part of the debt to be due, and we are entitled by the provisions of section 244, to compel its payment by attachment.

DALY, J.—(Orally). The granting of this attachment does not necessarily conflict with the law abolishing imprisonment for debt. The Code declares that where the answer admits a part of the plaintiff's claim to be due, the court may enforce an order directing the defendant to satisfy so much of the

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Merritt a. Thompson.

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claim, in the same way as it enforces a provisional remedy; that is, by attachment. Such an order has been made. The defendant has neglected to comply with it, within the time given to him, and the plaintiff is entitled to an attachment, for presumptively the defendant is in contempt.

There need be no conflict with the law abolishing imprisonment for debt. Upon the return of the writ the defendant may purge his contempt. He may satisfy the court of his pecuniary inability to comply with the order, and if he does so, the court would undoubtedly discharge the attachment.

Motion granted.

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MERRITT a. THOMPSON.

*New York Common Pleas; General Term, January, 1855.*

ADMISSION OF PART OF PLAINTIFF'S CLAIM.—SATISFACTION.

When a fund in litigation has been brought into court, and the answer of defendant admits a part of it to be due to the plaintiff, but disputes his claim to the residue, —the court may order the sum admitted to be due to be paid over to the plaintiff without prejudice to his further claims.

Previous offers by the defendant to pay that sum to the plaintiff, in full satisfaction of his claims, form no reason why such an order should be refused.

The distinction between an offer on the part of defendant to let judgment be taken against him for a specified sum, and his admission by answer that a part of plaintiff's claims is just.

*It seems*,—that the general term should not on appeal from an order directing the payment of money admitted to be due to the plaintiff, review the discretion exercised at special term in respect to conditions on which the order should be granted.

Appeal from an order at special term directing payment to plaintiff of moneys admitted to be due to him.

The plaintiff set forth in his complaint that the defendant was indebted to him for the proceeds of the sale of the plaintiff's interest in the ship *Mischief*, and also for earnings of the ship; which proceeds and earnings defendant had received as agent of the plaintiff, and had been deposited by him to his own credit with his bankers. He prayed and obtained an injunction forbidding the defendant to interfere with the deposits.

The answer admitted that a certain sum was due the plaintiff, but denied the residue of his claim.



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Merritt a. Thompson.

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On the application of defendant, an order was then made, allowing him to pay into court the fund deposited with his bankers,—and this was done.

Subsequently the plaintiff applied at special term for an order directing the clerk to pay over to him, out of the fund in court, the amount admitted by the answer to be due him. The order applied for was granted, the following opinion being filed.

INGRAHAM, F. J.—The defendant by his answer admits that, after deducting all his alleged counter-claims, there remains a balance due to the plaintiff, and such balance amounts to \$2,675 34. To this part of the claim no defence is set up, and the plaintiff now moves that the defendant be ordered to pay over such moneys, and that so much of the money now deposited in court be paid over therefore. For the reasons why in such cases the motion should be granted, I refer to the opinion in the case of *Meyers v. Trimble*,\* decided this day at special term. It is objected by the defendant, in addition to other objections therein referred to, that in this case a difference of interest will accrue in favor of the defendant on his counter-claim in consequence of the money being deposited in the Trust Company, under an order of the court, at a low rate of interest. The objection is unavailing. The money in the Trust Company was not placed there at the request of the plaintiff, but of the defendants, and, if the interest is small, the plaintiff only receives at that rate on this order. The defendant had no right to object to what was done at his request, and if it were otherwise, the defendant has security in the bond given on the injunction sufficient to protect him against loss on the counter-claim.

The motion must be granted.

From this decision the defendant appealed.

*F. Dykers*, for appellant. I. Section 244 of the Code, is inconsistent with the whole spirit of our legislation in regard to imprisonment for debt. It gives the court power in any case, where a sum is admitted to be due, to incarcerate the

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\* *Ante*, p. 219.

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Merritt a. Thompson.

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defendant in case he disobeys the mandate to pay, whether he is wholly unable to pay or not. (*Dolan v. Petty*, 4 *Sand. S. C. R.* 673).

II. In the present case one of the sureties put in by plaintiff on the arrest and injunction, is insolvent, the other is in bad credit, and the plaintiff himself is not a householder. Certainly it should be made a condition of granting the order that plaintiff put in fresh security.

*H. F. Clark*, for respondent.

WOODRUFF, J.—The complaint herein is filed to recover from the defendant a large sum of money alleged to have come to the defendant's hands as agent for the plaintiff; and an injunction having been granted to restrain the disposition of the specific fund in the defendant's hands or in the hands of his banker, the defendant himself moved for and obtained an order, in pursuance of which the money held under injunction was brought into court and deposited in the New York Life and Trust Company to abide the further order of the court. Upon the coming-in of the answer, the plaintiff applied at special term before the first judge and obtained an order upon motion, directing the payment to the plaintiff of the sum of \$2675,34 out of the money so brought into court. This motion was founded upon the provisions of § 244 (Subdiv. 5) of the Code of Procedure, and from the order so made the defendant appeals.

I concur with the first judge in the propriety of making the order upon the plain and unqualified admissions in the defendant's answer. The plaintiff claims the proceeds of a sale of the ship, made in China. The defendant sets up a sale of the ship at San Francisco for a less sum, admits that the plaintiff is entitled to the proceeds of that sale, and denies that the plaintiff has any interest in the sale in China, (which he avers was made for the account of the San Francisco purchaser). And the defendant annexes to his answer a statement of his account with the plaintiff, crediting to him the proceeds of the sale at San Francisco, and charging him with all the remittances and all his claims for commission and for matters of set-off, and by his sworn answer declares it to be a "full, accu-

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Merritt v. Thompson.

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rate and true account," &c., and that account in very terms states that the "balance due W. H. Merritt (the plaintiff) is \$2675,34"—and again in his answer he denies that any greater sum than \$2675,34 is due to the plaintiff.

Now, however much the parties differ in relation to the other matters stated in the complaint and answer respectively, it is not disputed in any form that at least so much as \$2675,34 of the moneys now in court do belong to the plaintiff. To this extent the defendant's answer, read with the schedule annexed, is unqualified.

This appears to me to be the precise case contemplated by the provisions of the Code above referred to, viz.: "when the answer of the defendant admits *part* of the plaintiff's claim to be just, the court on motion may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a provisional remedy."

But the counsel for the appellant insists that the defendant has offered and tendered to pay this sum heretofore, and that therefore the court ought not to make the order for the payment, but require the plaintiff to accept the offer as in full for his claim if he takes the money at all. It appears to me that nothing could be more inequitable; it is in effect saying to him, "abandon your claim, take just what the defendant admits to be due, admit all that the defendant alleges as a defence, and be content; if you will not do this you shall not take the money which is your own, to which the defendant admits he has no title, and which is in court awaiting the order which may be made, and which (whatever may be the result of the matter in dispute) *must* be decreed to belong to you."

Where a defendant is insolvent, and either comes in, by the offer to allow judgment to be taken against him for a sum named under § 385 of the Code, or by his answer makes such an offer, the court should and would be very careful not to substitute process of attachment for contempt in the place of a judgment and ordinary execution, since the former might involve imprisonment of the body in many cases where such imprisonment for a mere debt was probably not contemplated by the legislature. But where, as in the present case, the defendant not only admits this part of the plaintiff's claim to be

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Merritt a. Thompson.

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just, but actually offers to pay it if the plaintiff will abandon his other claims, and especially where the money is itself under the control of the court, no such reason exists, and there seems to me to be no reason for withholding the money from the plaintiff.

In giving power to the court (when a defendant admits a sum to be due) to make a peremptory order that the defendant pay it and to enforce the order by attachment, the legislature did not intend to introduce imprisonment for debt in cases where it is not allowed upon other grounds, except when the refusal to pay was contumacious, and not the result of inability. If a defendant has the money and only refuses because he is unwilling, it is in all respects proper that he should be compelled to pay and be imprisoned until he does so.

The counsel for the appellant further insists that the order should at all events have only been granted upon terms—that it appears by the affidavits read on the motion that one of the sureties to the undertakings given on granting the order of arrest and the injunction herein, has become insolvent, and the plaintiff ought to have been required to give a further undertaking. It appears to me that such a requirement would not have been unreasonable, but I do not think the order should be reversed upon that ground.

Indeed I doubt very much the propriety of reviewing upon appeal the discretion exercised by the judge at special term. It is true that an order granting or refusing a provisional remedy may be appealed from, and hence this appeal is properly brought, and under the same provision of the Code an appeal may be brought from an order directing an arrest. But on an appeal in the latter case the court would not, I think, review the discretion exercised by the judge in determining whether such order shall issue upon an undertaking "with sureties" or an undertaking "without sureties," either being proper as the judge granting the order may direct.

The same remarks are applicable to an order granting an injunction either on an undertaking by the plaintiff with sureties or without sureties, as the court or judge may direct. The question whether or not in such case the injunction was proper, is undoubtedly the subject of review, but I very much

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Slauson v. Conkey.

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doubt the propriety of considering those matters of discretion, which relate to the terms or conditions imposed. So in regard to the granting or refusing of costs or requiring a party to give time or other indulgence as a condition of granting an order, it seems to me that the action of the special term should be regarded as final when no right of the party nor any rule of law is violated.

Again, in the present case, the court, on granting the injunction, might have dispensed with sureties altogether, or might have been satisfied with the undertaking on the part of the plaintiff with one surety. The defendant has now the liability of the plaintiff himself and of one solvent surety, and this will ordinarily prove ample to protect the defendant.

Besides, the only damages which the defendant is liable to sustain by the litigation, against which he could ask indemnity, is a possible loss of interest on the fund in court at the rate of two per cent per annum, and his costs of suit. There is no pretence that the plaintiff is not solvent and fully able to meet any liability to indemnify the defendant in these particulars if the latter should recover judgment. There is, moreover, at least one solvent surety to the plaintiff's undertaking.

I am not, therefore, disposed to interfere with the discretion exercised at special term in not imposing upon the plaintiff the duty of giving further security as a condition of granting the order, and on the merits I think the order was eminently just and proper. It should therefore be affirmed.

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SLAUSON v. CONKEY.

*Supreme Court, First District; Special Term, January, 1855.*

ADMISSION OF PART OF PLAINTIFF'S CLAIM.—SATISFACTION.

Plaintiff sued to recover the price of goods sold to defendant, with damages for non-delivery of notes agreed to be given in payment for them. The defendant by answer, admitted the purchase of the goods at the price stated.

*Held*;—that an order might be made under § 224 of the Code, requiring the defendant to pay the price of the goods.

Motion that defendant be required to satisfy a part of plaintiff's claim, admitted by his answer to be just.

ROOSEVELT, J.—The defendant admits in his answer that he has had the plaintiff's goods—that he purchased them at the price stated—that such price was to be paid in certain specified indorsed notes at six months, which he was to forward to the plaintiff within three or four weeks—that he has not paid for the goods either in such notes pursuant to his agreement, or otherwise—that he has nevertheless sold a part of them and assigned the residue for the benefit of creditors.

The plaintiff's action is for the value of the goods, treating the sale as a conditional one, and the defendant's acts as a wrongful conversion.

They are willing now, however, instead of incurring the expense and delay of a trial, to take the defendant's answer, and to confine their remedy to its admissions.

"When the answer of the defendant, (says the amended Code, § 244), admits part of the plaintiff's claim to be just, the Court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a provisional remedy."

Such motion is now made. Strictly construed, the case would seem not to come within the provision. In principle, however, it does. And the Code prohibits a strict construction, not only of its own language, but of the language of all proceedings under it. All allegations are to be "liberally construed." And in the 176th section, lest the object should in any case be lost sight of, the legislature have dictated a rule so clear and comprehensive as to admit of no doubt, and so positive as to allow of no evasion. "The court, (say they) shall in *every* stage of an action, disregard *any* error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

If there be any defect therefore in the complaint in its adaptation to the case admitted in the answer, such defect must be disregarded, unless it affect, as it is obvious in this case it does not, the substantial rights of the defendant. Treating then the suit as substantially an action for the price of the goods, and perhaps something more in the shape of damages for the non-delivery of the notes; and treating the answer as an admission

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Jacques a. Greenwood.

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of the justice of the first part of the claim, I am compelled to make an order requiring the defendant to satisfy that part, to wit, \$678 34, with interest from the 21st May, 1851.

I am the more free to make this order, as it can do no conceivable injustice to the defendant, while a denial of the application could only result in delay, vexation and expense to the plaintiff, turning him over either to a new suit or to a very superfluous trial by jury, to determine an issue which the defendant to all practical purposes, has substantially admitted."

Order accordingly, with costs.

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JACQUES a. GREENWOOD.

*New York Common Pleas; Special Term, January, 1855.*

ENTRY OF JUDGMENT.—JOINT DEBTORS.

Where several defendants are sued on a joint liability, there can only be a joint recovery and judgment; and no judgment can be entered by plaintiff, until all the defendants served have had the full time to answer.

Where a joint answer of two defendants was served after the time for answering by one of them had expired, and the plaintiff's attorney returned it, waited until the time of the other defendant had also expired, and then entered judgment:—*Held*, that the judgment was regular.

Motion to set aside judgment.

The action was upon a promissory note made by the defendants, Greenwood and Brewster, in their firm name of Greenwood & Co. On the last day for answering by the defendant Greenwood, which was the day after the defendant Brewster's time expired, towards the latter part of the afternoon, the attorney of both the defendants, served a joint answer by both of them. The plaintiff's attorney returned it, with written notice that he could receive no answer from Brewster, his time having expired. The next day he entered the judgment which was now sought to be set aside.

*J. A. Stoughtenburgh*, for the motion.

*W. R. Stafford*, opposed.

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Jacques a. Greenwood.

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INGRAHAM, F. J.—In an action against joint debtors, the time to answer had expired as to one defendant, but not as to the other. The defendants' attorney served an answer as to both, which was returned by the plaintiff's attorney, and on the same day judgment was entered up against both defendants. A motion is now made to set aside the judgment.

The practice of entering up judgment against two joint debtors on the default of one, before the time for answering on the part of the other defendant had expired, cannot be approved. The right to take judgment against one defendant on default, before the other has answered or made default, only applies to cases where a several judgment is proper, and cannot authorize a judgment against both defendants, even so far as to affect only partnership property. But where the liability is only a joint liability, there can only be a joint recovery and judgment, and no judgment can be entered up until all the parties served have had the full time to answer. The 136th section of the Code lays down the practice very clearly, where it says, if all the defendants have been served, judgment may be taken against them severally, when the plaintiff would have been entitled to judgment if the action had been against such defendants alone. If the action be against defendants jointly liable, the plaintiff may proceed against the defendant served, and Justice Parker's comments on this section in *Mechanics and Farmer's Bank v. Rider*, (5 *How. Pr. R.*, 401), show that this judgment is irregular.

I would deny this motion if I could consistently with the provisions of the Code, because it is apparent to me that the answer is evidently put in for delay, and in some respects must be false. The answer admits the making of the note by the defendants as partners, to the payee, and denies any knowledge or information sufficient to form a belief as to the other allegations of the complaint. One allegation is that the defendants have not paid the note, and it can hardly be believed that the defendants have not information or knowledge sufficient to form a belief whether they have paid such note or not. The other allegations which are denied are the indorsement by the payee, and that the plaintiffs are the lawful holders of the note. Of both these facts the defendants could



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have satisfied themselves with much less trouble than they could have made and sworn to such an answer.

The plaintiff's attorney was right in returning the joint answer of the defendants after the time for pleading by Brewster had expired, and as he had waited until the time for the other defendant to answer had also expired, his judgment is regular. This motion is denied, with leave to defendants to renew motion on papers disclosing the defence they intend to set up to the plaintiff's claims. The costs of this motion to remain until renewed motion is decided.

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JACKS a. DARRIN.

*New York Common Pleas ; Special Term, January, 1855.*

COSTS.—REVERSAL OF JUSTICE'S JUDGMENT.

On the reversal of a judgment of a justice of a district court, the appellant is entitled to those costs of the court below, to which he would have been entitled if the proper judgment had been rendered there.

Appeal from taxation of costs by the clerk.

This case was brought into this court on appeal from the judgment of a district court, and that judgment was reversed.\* The appellant, who was the plaintiff below, desired the clerk to include in the amount of costs to be inserted in the entry of judgment awarded to him, the costs to which he would have been entitled had judgment been rendered in his favor in the court below. This the clerk refused to do, and appeal was taken from his decision.

*P. Van Antwerp*, for appellant.

*W. R. Stafford*, for respondent.

INGRAHAM, F. J.—The question submitted to me in this case is, whether, on a reversal of a judgment of an inferior court, the appellant is entitled to the costs of the court below, which he would have been entitled to if the proper judgment had been rendered there.

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See *Ante*, 148.

By the 371st section of the Code, the party succeeding in the appeal is to receive the fees and costs therein specified, and no other except disbursements. These costs so specified evidently were intended as the compensation for the services on the appeal, and the disbursements must likewise be limited to disbursements made during the appeal. By the 354th section, provision is made for the repayment to the appellant, when successful, of the costs of the court below, paid by him on appealing. By the 330th section, in case of a reversal of the judgment, the court is to restore the appellant to all property and rights lost by the erroneous judgment. If the proper judgment had been rendered in the court below, the appellant would have recovered his costs there. This was a right given him by the statute, of which he was deprived by the erroneous judgment below, and which the courts should make restitution by ordering it now to be paid.

This section has received a similar construction by Judge Welles, in the case of *Estus v. Baldwin*, (9 *How. P. R.*, 80).

The court, however, must make such restitution, and it cannot be done as a matter of course by the clerk. The better course probably would be to submit with the appeal papers the application for costs, in case of reversal, with the certificate of the clerk below of the amount of costs, and in such case the order could be made on deciding the appeal.

In this case the parties have submitted all the facts, and the order can now be made directing the clerk to include in the bill of costs the amount as certified to by the clerk of the Marine Court.

The clerk was right in rejecting the item of costs paid by the appellant on his appeal. That money remains with the court below, and as before stated, is to be repaid by the justice in case of reversal. The respondent has never received it, and it should not form part of any judgment against him.

No costs allowed on this motion to either party.

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Miller *a.* De Peyster.—Anderson *a.* The Same.

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MILLER *a.* DE PEYSTER.—ANDERSON *a.* THE SAME.*New York Superior Court; General Term, January, 1855.*

## COSTS.—INTERPLEADER.

Upon a bill of interpleader, the unsuccessful claimant adjudged to pay all costs recovered by the plaintiff, and also all costs of his co-defendant, both upon the bill and in an action at law between the claimants upon the same subject matter.

Certain sums were due from the plaintiffs, to the owner of certain real estate for rents of the same. The title being in litigation, the plaintiffs filed bills of interpleader against the defendants, De Peyster and Van Rensselaer, who were the adverse claimants, at the same time paying into court the rents, or a large portion of them. A decree was entered in favor of the defendant, De Peyster, and adjudging that he and not the co-defendant, Van Rensselaer, was entitled to the rents, and adjudged the plaintiffs entitled to their costs in this suit, and also to their costs in several suits at law previously brought against them by the defendant, De Peyster, in the Supreme Court, to be paid out of the fund paid into court on filing the bills.

The decision of the court, however, upon the point as to which defendant should be ultimately responsible for the payment of the plaintiff's costs, was reserved, in order that evidence might be taken as to whether any understanding or arrangement had existed between the co-defendants relative to the enforcement of their claims against the plaintiffs. Such an arrangement the defendant, Van Rensselaer, had alleged and his co-defendant De Peyster denied.

Evidence upon this point being reported by the referee which failed to substantiate the alleged understanding, the following opinion was rendered by the court on the question of the apportionment of the costs.

*Cambridge Livingston* for defendant, De Peyster.

*Joseph Blunt*, for defendant Van Rensselaer.

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Miller *a.* De Peyster.—Anderson *a.* The Same.

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BY THE COURT. HOFFMAN, J.—By a decree of the general term of this court, made on the 11th of October, 1852, it was declared that the defendant, Van Rensselaer, had no title or interest in the funds referred to in the pleadings; but that the same belonged exclusively to the defendant, De Peyster, and that the claim set up by defendant, Van Rensselaer, was totally unfounded and untrue. The decree declared a certain sum to be due from the plaintiff, Miller, to the defendant, De Peyster, for rent, and certain other sums from the other plaintiffs. A large part of the moneys so decreed to be due, had been paid into court by the plaintiffs upon filing their bills. These sums were adjudged to belong to De Peyster, and the plaintiffs ordered to pay him the balance respectively, if there should remain any balances after payment of their costs, to which the decree declared them entitled, as well as to the costs of the suit instituted against them by the defendant, De Peyster, in the Supreme Court. These bills were bills of interpleader, filed by the respective plaintiffs, after suit at law commenced against them by De Peyster, and by reason of a claim for such rents, made upon the parties by the defendant, Van Rensselaer.

The court at general term did not proceed to determine the question of costs as between the co-defendants in the interpleader suits, in consequence of an averment that an arrangement had existed between the late John Watts, and Van Rensselaer, and also between Van Rensselaer and the defendant, De Peyster, relating to the enforcement of the claims for rent. An order of reference was made to inquire into the existence and extent of any such arrangement, and the question of costs is now to be settled upon the report which has been made upon that matter, and the accompanying evidence.

The defendant, De Peyster, denies in his answer any such agreement as is alleged, and there is no proof whatever to establish it against him.

Evidence is adduced to shew that there was such an arrangement made with Mr. Watts, the effect of which would be that the institution of such suits for rent, was a violation of a contract between Van Rensselaer and himself, and should at least exempt the latter from paying costs. This testimony consists

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of several letters from Mr. Watts, none of which in any degree establish the allegation. The other is the testimony of the highly respectable counsel, who can only speak of a contemplated arrangement for the collection of the rents and payment into the Trust Company, which he allows was not consummated. There is also some unimportant evidence of Anthony Pricker, as to a conversation with Mr. Watts, in which he was told by the latter that he need not pay any more rent till the matter was settled.

It should be observed that Mr. Watts died in 1836, and the suits in question were not commenced until the year 1847.

This defendant has failed in proving any agreement competent to vary the ordinary rule in these cases as to costs.

That rule is well settled, and renders the unsuccessful claimant responsible for costs in all cases except where special circumstances have induced the court to exercise its discretionary power in his favor. (*Richards v. Salter*, 6 *John. Ch. Rep.* 448, and cases cited; also *Mason v. Hamilton*, 1 *Simons*, 19).

The costs allowed under these decisions are undoubtedly all the successful defendant's costs in equity, and all the costs which are taken by the plaintiff in the interpleading bills both in equity and at law. I have had some doubt as to the costs of that defendant at law, and these were not given in *Richards v. Salter*, nor apparently in *Henary v. Key*, (*Dickens*, 291). But it was done in the well-considered case of *Dawson v. Hardcastle*, (2 *Cox*, 277), and in *Mason v. Hamilton*, (1 *Simons*, 19). It appears to be the reasonable rule.

The order will be, that the defendant De Peyster recover from the defendant Van Rensselaer all the costs which the plaintiff shall be paid or retain out of the money in court, or the unpaid balance in their hands respectively, and also all the costs of such defendant in this suit, and of the action at law commenced by him.

The order will be drawn by the defendant Van Rensselaer's attorney, and submitted for settlement upon notice.

DEUEL *a.* SPENCE.*Court of Appeals ; December Term, 1854.*

## PLEA OF USURY.—VARIANCE.—ACCOMMODATION INDORSEMENTS.

The provisions of the Code respecting variance between pleadings and proofs are applicable to the defence of usury.

Unless the proofs of usury differ from the answer in its entire scope and meaning, the variance will be deemed immaterial if the plaintiff gives no proof that he was misled to his prejudice.

Testimony going to show usury, but at a different rate from that alleged in the pleadings ; *held*, wrongfully excluded.

It seems that it is no misapplication of a note sufficient to discharge an accommodation indorser that the note is discounted or pledged by the maker in a manner in violation of the understanding had with the indorser, so long as the proceeds fairly realized are not misapplied.

This was an action brought in the Superior Court by the plaintiff, a partner in the late firm of Buckley, Jr. & Deuel, upon two promissory notes made by Sweet & Tibbs, and indorsed by Spence, and which, upon the dissolution of the partnership, being over due and unpaid, had been assigned to Deuel by his co-partner.

The defendant Spence, the indorser, averred in his answer, "that the notes mentioned in the complaint were indorsed by this defendant without any consideration therefor, for the benefit of and to enable the firm of Sweet & Tibbs to obtain a loan upon one of them only, from one of the banks at which they were respectively made payable, and upon the agreement that the one not discounted should be returned to this defendant ; and in case neither should be discounted, both should be returned to the defendant or destroyed. That said Sweet & Tibbs failed to get either of said notes discounted at either of the said banks, and wholly omitted to either return or destroy said notes according to said arrangement and agreement. That instead of returning or destroying the same, he deposited or delivered the said note for \$675 with Buckley, Jr. & Deuel, of which firm the plaintiff at the maturity of said note was, and defendant believes still is, a member thereof, to secure an

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antecedent or pre-existing debt previously due to the said Buckley, Jr. & Deuel for about \$544, for a usurious loan of that amount made by them to Sweet & Tibbs at the rate of one per cent per month, or more than the legal rate of interest allowed by law, and upon the understanding that said Buckley Jr. & Deuel should forbear and give twelve or fifteen days further time of payment of said \$544 at the rate of one per cent per month for interest, and also deposited or delivered said note of \$700 to said Buckley, Jr. & Deuel as a security for a loan of \$675 then and there loaned by them to said Sweet & Tibbs upon a corrupt and unlawful agreement, that said Buckley, Jr. & Deuel should give twenty days for the payment thereof, and take and reserve for the use or forbearance of said sum of \$675 interest at the rate of one per cent per month, or a greater sum than that allowed by law for the use or forbearance of money. That before or at the time of taking said note, as this defendant is informed and believes, the said Buckley, Jr. & Deuel had full notice of the object for which they were indorsed by this defendant, and that they were indorsed without consideration, and notwithstanding such knowledge of the misapplication and want of consideration, took the said notes as aforesaid."

These allegations were denied by the reply.

On the trial the counsel for defendant offered to show a general agreement between Buckley & Deuel, and Sweet & Tibbs, as to the amount of interest to be paid by Sweet & Tibbs, and received by Buckley & Deuel, on all moneys lent by them to Sweet & Tibbs. The counsel for the plaintiff objected to the testimony. The court overruled the testimony, and the counsel for the defendant Spence excepted.

Upon the point of usury, among others, the court charged the jury that if the note had been discounted, or money advanced upon it at the rate of one per cent a month, as the defence set up, the plaintiff could not recover; but that unless it was proved that the rate was to be one per cent a month, the defendant was liable. And to this the defendant's counsel excepted.

Verdict was found for the plaintiff.

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Deuel & Spence.

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The defendant's motion for a new trial was denied at the general term, and he appealed.

*Elijah Ward*, for appellant.

*E. L. Fancher*, for respondent.

RUGGLES, J.—On the trial of this cause the defendant's counsel requested the judge to charge that if Spence was an accommodation indorser, and the notes were made for the purpose of having one or both of them discounted at one or both of the Newburgh banks, then the notes were diverted from their original purpose, and that the plaintiff was not entitled to recover.

The judge was right in refusing to charge according to this request. According to the testimony of Sweet, the notes were drawn to enable Sweet & Tibbs to raise money, and there is nothing in the case to show that the money when raised, was to be applied to any particular purpose. They had the right to apply it to such purpose as they chose. It was entirely immaterial to Spence whether the notes were discounted at a bank at Newburgh, or by an individual at any other place. (*Powell v. Waters*, 17 *Johnson*, 176). In *Brown v. Taber*, 5 *Wend.* 566, the note was indorsed for the accommodation of the maker, for the purpose of enabling him to redeem the property of one of his neighbors taken in execution. It was payable at a bank in Albany, offered there by the maker for discount, refused and returned to the maker with the bank marks upon it, and afterwards applied by him to the purchase of lottery tickets at an exorbitant price, a few days before its maturity. This was an application of the note to an entirely different purpose from that for which it was made; and under circumstances, which in the opinion of the court, were sufficient to charge the holder with notice of its misapplication.

In the present case, if the note was fairly discounted by Buckley & Deuel, whether for money paid at the time, or for a precedent debt, there was neither fraud nor misapplication of the note. If the note had been discounted at Newburgh, Sweet & Tibbs might rightfully have applied the money to the payment of their check held by Buckley &



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Deuel, and they did no wrong to the indorser in paying the note to that firm for that purpose.

Nor can I perceive how Buckley & Deuel's knowledge of the original intention to have the notes discounted at one of the banks of Newburgh could make any difference in the case so long as Sweet & Tibbs were at liberty consistently with their duty to their indorsers to apply the proceeds of the notes to the payment of their debt to Buckley & Deuel. In the *Seneca County Bank v. Neass*, (3 *Comst.* 442), it was decided that when a note was indorsed for the accommodation of the maker without any restriction as to the particular purpose to which it should be applied, the maker had a right to appropriate it to any purpose which he might deem for his own interest, and he having appropriated it to the payment of a note, held by the plaintiffs against him, the consideration was declared to be sufficient to render it valid in their hands. The holder in that case and under those circumstances recovered against the accommodation indorser.

We think there was no error in any part of the charge of the judge for which the judgment can be reversed, except in what he said in regard to the question of usury.

In the course of the trial for the purpose of showing the transaction usurious, the defendant's counsel offered to show a general agreement between the firm of Buckley & Deuel, and the firm of Sweet & Tibbs, as to the amount of interest to be paid by the latter firm for moneys borrowed of the former. This evidence was objected to and excluded, and an exception taken to the decision. And the judge charged the jury that the usury must be proved to have been taken at the rate of one per cent a month, as set up in the answer, and that if not so proved, the defendant was liable on the \$700 note.

The evidence of the agreement as to the rate of interest was probably rejected on the ground that the offer did not specify that the rate of interest agreed on, was the same as that stated in the answer. We think the proof offered was erroneously excluded; and that there was error in the part of the charge last referred to.

In *Catlin v. Gunter*, (1 *Kernan*, 368), decided at the last Sep-

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tember term, it was held that the provisions of the Code of Procedure on the subject of a variance between the pleading and proofs, are applicable to cases in which usury is set up as a defence; and that a variance between the answer and the proof in such a case should be deemed immaterial, unless the proof differed from the answer in its entire scope and meaning, if the plaintiff gave no proof that he was misled to his prejudice. According to this case a variance as to the rate of interest merely, should, we think, have been disregarded at the trial. The evidence offered should have been admitted, and the jury instructed in conformity with the rule adopted in that decision.

The judgment below must be reversed, and a new trial directed, with costs to abide the event of the suit.

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 ELY a. MILLER

*Supreme Court, First District; Special Term, January, 1855.*

PLEA OF USURY.—EXAMINATION OF PARTIES.

Under the Code a defendant cannot be examined by his co-defendant to establish usury as a defence to their joint promissory note.

Application for a commission to take testimony.

This was an action against two defendants, Miller and Reed, as makers of a promissory note. The defence was usury. The defendant Reed applied for a commission to examine his co-defendant, Miller.

ROOSEVELT, J.—The law at present in England allows parties to a suit to testify in their own favor, leaving the question of credibility, under a full view of all the circumstances, to the determination of the jury. We have high authority for saying—notwithstanding the confident predictions of the foreboders of evil—that in the courts of that country the change in practice works well. Indeed, it always seemed—and in this state still seems—a strange anomaly, that while on the most important motions as they are technically called, the parties should

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not only be, as from time immemorial they have been, allowed to testify in their own favor, and on paper too, and without cross-examination, yet under the same system of jurisprudence on what are technically denominated trials, the same witness, although offered to the same points, with the additional advantage of an oral and face-to-face cross-examination in open court, should be excluded. Such, nevertheless, is still the law in this state. Efforts have been made to change it, and to remove the manifest contradiction alluded to; but thus far without success. All that our legislature as yet has been willing to do, has been to allow one party to call his opponent, and, in certain cases, one opponent to call another. And the question presented on the application now made is: Can one of two joint makers of a promissory note, sued jointly as such, be a witness for his colleague?

One defendant, says the Code, section 397, may be examined on behalf of his co-defendant as to any matter in which he is not jointly liable or jointly interested, and as to which a separate and not joint verdict or judgment can be rendered. Now what, under the commission applied for by Reed, is the "matter" as to which he seeks to examine his co-debtor Miller? The defence, and the only defence is usury. And is not Miller "jointly interested" with Reed in this "matter?" If the usury be established by his testimony, does he not necessarily prevent any judgment against either defendant? Does he not, in effect, destroy the note on which he would otherwise be "liable jointly with his co-defendant?" The note, it is said, is both joint and several. Is not that an option invested, not for the benefit of the makers, but of the payees? The plaintiffs, no doubt, might have sued Reed alone; but they were not bound to do so. They have elected—and they had a right to elect—to sue on the joint promise, and to ask for a joint judgment—a judgment which, when entered, will bind all the joint property and merge the entire contract, and prevent any separate action afterwards against Miller, although he may not have been served with a summons in this: and which, even as to his separate property, although open to other defences, will forever preclude any defence of the statute of limitations. (*Code*, section 379). The plaintiffs, I have said,

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can have no separate judgment in this action. This action is not brought on the several, but on the joint promise, and on that alone. But to prevent all doubt, the plaintiffs have stipulated—although the form of their complaint would seem to render any stipulation superfluous—to ask no judgment unless against both. If, then, the defendant, Miller, should, by his own testimony, establish the defence of usury, he by his own testimony defeats the action altogether. To say that he is not “jointly interested” with Reed in such a result, stating the law as above explained, is a manifest absurdity. For although there may be no joint property at present, there may be joint property hereafter; and, at all events, the statute of limitations is a sufficient consideration to create an interest “in the matter.” But that is not all; a judgment of dismissal in this action, on the ground of usury, would, as *res adjudicata*, be a complete bar to any action hereafter, either joint or several, on this same note, against Miller. To admit him to swear at all, therefore, is to admit him to swear for himself. And, consequently, until the legislature shall otherwise provide, the present application, and all other applications of like character, must be denied.

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SMITH v. WRIGHT.*Court of Appeals, December Term, 1854.*

## ALLEGATION OF TENDER.—PARTNERSHIP.

In a suit for damages on the breach of a contract, the complaint is defective unless it alleges an offer or tender of performance on the part of the plaintiff.

Two mercantile firms mutually agreed each to put out contracts for sale and delivery of produce at future days, all profits of such adventures and all losses to be equally divided between the firms;—*held* that the one firm were liable as partners upon a contract made accordingly, and signed by the other firm.

This action was brought in the Superior Court. The complaint alleged that the defendants, Wright and Losee, composing the firm of Wright & Losee, and the defendants, Otis & Glover, composing the firm of A. W. Otis & Co., mutually agreed to make contracts in the name of their respective firms, for the delivery of produce at a future day, with a view to

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realize an expected rise in prices ; such contracts to be for the joint account and benefit, and both profits and losses resulting from such adventures to be equally divided. The contract upon which this suit was brought, was made in pursuance of this agreement, by the firm of Otis & Co. It was a written contract to deliver to Collomb & Iselin two thousand barrels of flour. It was signed A. W. Otis & Co. The complaint further alleges that when the flour became deliverable, according to the terms of the contract, the contract was held by E. & W. Herrick ; but that Otis & Co. did not deliver the same or any part thereof, although requested so to do by the said E. & W. Herrick, and although the said E. & W. Herrick were ready and willing to accept and receive the same, and to pay for the same, at the rate or price aforesaid ; nor did the said defendants, Wright & Losee, deliver the same or any part thereof ; but the said defendants wholly neglected and refused to deliver the same or any part thereof.

Subsequently Smith, the plaintiff, became by assignment the owner of the contract, and brought suit upon it. The defendants, Wright & Losee, demurred, that the contract being signed by Otis & Co., was not sufficient to Charge Wright & Losee, and that it did not appear that any demand of the flour or any tender of the price had been made.

Judgment being given at special term, for the plaintiff on the demurrer, the defendant appealed, and at the general term that judgment was reversed. The opinion delivered at the general term, (5 *Sandf.* 113), considered only the first ground of the demurrer, and held that as the plaintiff had failed to show that the contract in question was subscribed by Wright & Losee, it could not therefore be enforced against them. Judgment being entered thereupon for the defendants, the plaintiff appealed.

*F. H. Rodman*, for the plaintiff.

*B. W. Bonney*, for the defendant.

EDWARDS, J.—The complaints in the action alleges that the defendants, Wright & Losee, then composing the firm of Wright & Losee, and the defendants, Otis & Glover, composing

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the firm of A. W. Otis & Co., mutually agreed to make contracts, or agreements, in the names of their respective firms, with divers persons for the sale and delivery of flour and other produce, at a future day, with a view to realize the rise or increase in the prices of produce which they then anticipated would take place in the market, and upon the express agreement that such contracts should be made for the joint account and benefit of said two firms, and that the profits resulting therefrom should be equally divided between them, and the losses, if any, should be borne by the said two firms, in equal proportions. The complaint further alleges that in pursuance of this agreement, the firm of Otis & Co., for the joint benefit and account of the two firms, entered into a contract in writing with the firm of Collomb & Iselin, which contract is particularly set forth. This contract, after passing through several hands, was finally assigned to the plaintiffs. To this complaint the defendants, Wright & Losee, demurred. The first question which is presented, is whether the agreement which is set forth in the complaint, created a partnership.

The well established rule is, that if a person partakes of the profits of any branch of trade or business, he is answerable as a partner for the losses. The reason of this is, that if he takes a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts. (*Grace v. Smith*, 2 *W. Black.*, 998; *Dob v. Halsey*, 16 *John.* 34; 3 *Kent*, 27). The only qualification of this rule which has ever been acknowledged is, that when a person stipulates to receive a sum of money in proportion to a given quantity of the profits, as a reward for his services, he is not chargeable as a partner. (*Story on Part.*, 32, 33, 34, 45, and authorities cited in note. *Cary* 8, 9, 10, 11. *Gow.* 14, 19. *Collyer* 14, 15 & *Seq.*) And the propriety of even this qualification was doubted by *Ld. Eldon*. (*Ex parte Hamper*, 17 *Ves.* 401). In the present case, according to the terms of agreement between the defendants, the business was to be carried on for their joint account and benefit, and not only were the profits arising therefrom to be shared between them, but the losses were also to be borne by them in equal proportions. There is nothing in the agreement which in the least

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degree indicates that the shares of any of the parties were to be received as a compensation for services rendered. In the case of *Champion v. Bostwick*, (11 *Wend.* 571, *S. C. in error*, 18 *Wend.* 175), it was shown that three persons ran a line of stage-coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own carriages, horses, and drivers, and paying the expenses of his own section; but the money received, as fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided amongst the parties in proportion to the number of miles ran by each. Upon this state of facts, it was held that they were jointly liable as copartners to a third person, not a passenger, for an injury received through the negligence of the driver of the coach of one of them. In the case of *Everitt v. Chapman*, (6 *Conn.* 347), the parties had agreed that each one should purchase hides on his own credit, and should manufacture and sell the portion so manufactured by him, each party to participate in the profits. It was held that all the parties were liable as copartners to a third person, who sold hides to one of the parties, in ignorance of the partnership, and charged the same to him.

These cases have introduced no new principle, and I have alluded to them merely because they are in many respects similar to the one before us. The fact that the agreement in question was made between two firms already in existence, can make no difference as to the liability of the parties, for, as far as the agreement is concerned, the two firms stand upon the same footing as two individuals would. Neither can it make any difference that the contract which is now sought to be enforced, as the joint contract of the parties, was made in the partnership name of one of the firms, for the partnership agreement between the defendants authorized such a contract. (*Wright v. Hooker*, *Seld.* not yet reported; *Everitt v. Chapman*, *ubi sup.*). The court below, in giving their opinion, say that "the ground upon which a participation in the profits of a trade is held to make parties liable to third persons, though they never intended to be parties between themselves, as it was advanced by De Grey, Ch. J., in *Grace v. Smith*, and was adopted in *Dob v. Halsey*, is entirely wanting

in this case. Here Wright and Losee could not take any of the fund on which the creditors of Otis & Co., relied for payment." If the court mean that Wright and Losee could not take any of the fund which constituted the capital stock employed in the separate business of Otis & Co., or the profits arising therefrom, or that Wright and Losee could not take any of the fund employed in their joint business, except so far as it constituted the profits arising from such business, the remark is correct, although it is not apparent how that can have any bearing upon the question before us. But if the court mean that the interest which Wright and Losee had in the profits of that business which was carried on under the agreement with Otis & Co., did not give them a right to take any part of the fund upon which the creditors in respect to such business relied, the remark is founded upon an entire misconception of the general rule, and of the decision referred to; for Ch. J. De Grey expressly says that, "if any one takes *part of the profits*, he takes a part of that fund on which the creditor relies for payment." All interest which is necessary to constitute a partnership is an interest in the profits, and such an interest necessarily constitutes a partnership, unless, as has been stated, the interest in the profits is given as a compensation for services. The error into which the court below have fallen, is in confounding a community of interest in the property out of which the profits are to arise, with a community of interest in the profits themselves. The latter is all that has ever been considered necessary to create a partnership as against a third person. Whether the defendants were partners as between themselves, it is not necessary to inquire. They were so in reference to third persons, and the court below erred in coming to a different conclusion.

But although there is sufficient allegation of a copartnership, still I think that the complaint is defective in not alleging a performance, or, what is regarded as equivalent, an offer or a tender of performance on the part of the plaintiff, or those through whom he claims. The contract in suit was for the sale of flour, at a price agreed upon. The payment of the price was the consideration for the delivery. The payment and delivery were to be concur-



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Hyde a. Patterson.

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rent acts, and as was recently held by this court in the case of *Lester v. Jewett*, (1 *Kernan*), neither party is entitled to recover from the other without alleging an offer or tender of performance on his part. I think that for the reason last stated, the complaint is defective, and that the judgment should be affirmed.

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HYDE a. PATTERSON.

*Supreme Court, First District; Special Term, January, 1855.*

In proceedings for the claim and delivery of personal property, a general appearance by defendants, is a waiver of any irregularity in the affidavits on which the requisition is founded.

An undertaking dated the 12th, recited an affidavit then made by plaintiff; the only affidavit in the suit was made on the 13th, by a person not plaintiff. *Held* the undertaking good.

Motion to vacate proceedings for the claim and delivery of personal property.

This was a proceeding under section 206, *et seq.*, of the Code, for the claim and delivery of personal property. The affidavit on which the requisition was granted, was made by Allen W. Smith, as agent of the plaintiffs. This affidavit alleged that the plaintiffs were the owners of the property claimed; that it was wrongfully detained by the defendants, and contained a description of the property and a statement, on information and belief, of the defendant's claim thereto. But it did not state any facts showing ownership in the plaintiffs, nor did it state the actual value of the property claimed.

The undertaking erroneously recited that an affidavit had been made by one of the plaintiffs, while the only affidavit in the suit was that above mentioned, made by Allen W. Smith, who was not a party. The undertaking was dated the 12th of December, and the affidavit the 13th.

After the property was taken, the defendants excepted to the sufficiency of the sureties, and the sureties justified, plaintiffs making no appearance on the justification. Defendants then on the 23d December, gave notice of this motion to vacate

proceedings, and on the 3d day of January, but before the notice was argued, gave a general notice of appearance.

*E. P. Brooks*, for the motion.

*First.*—The affidavit is insufficient.

I. It is not made by either of the plaintiffs, but by a third party, who does not state his means of knowledge.

II. It does not state facts tending to show ownership by the plaintiffs or unlawful detainer by the defendants. A mere bare allegation by a third party of such ownership and detainer, is insufficient.

*Second.*—The undertaking is defective. It is made, dated and acknowledged the 12th day of December, at New York, and recited that an affidavit has been made by the plaintiff.

The affidavit upon which the property has been taken, is made and dated the 13th day of December, in Chemung county, by a person not a plaintiff, and not referred to in the undertaking.

The undertaking therefore does not refer to the affidavit used, or correspond therewith in any respect.

*William E. Curtis*, opposed.

I. The defendants by appearing generally in the action, have waived any irregularity in the affidavit. (*Roberts v. Willard*, 1 *Code R.*, 100).

II. By requiring plaintiff's sureties to justify, they lose any right to make any motion on the ground of irregularity. (*Whittaker's Pr.*, 670; 1 *Burrill's Pr.*, 367).

III. The mere mis-recital of a matter not necessary to be recited, does not effect the liability of the sureties in the undertaking. (*Conklin v. Dutcher*, 5 *How. Pr. R.*, 388).

IV. The court will allow a new replevin bond to be filed *nunc pro tunc*, where the one given on the execution of the writ is defective. (*Newland v. Willetts*, 1 *Barb. S. C. R.*, 20; 1 *Hill*, 204; 19 *Wend.*, 632; *Wilson v. Allen*, 3 *How. Pr. R.*, 369; *Burns v. Robbins*, 1 *Code R.*, 62).

*E. P. Brooks*, contra. The general appearance does not

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affect this motion—for it has been made since the notice of this motion.

Nor is it in any case a waiver. For this proceeding may be taken at any time before answer. Defendants may have appeared and demanded copy of the complaint before any proceeding of this sort were taken. Such an appearance could not oust them of their right.

CLERKE, J.—The general unconditional appearance of defendants; is a waiver of any irregularity in the affidavit.

The mistake in the recital of the bond, does not affect its validity. The essential part of the undertaking, and all that is required by the Code, is contained in the instrument in this case. It makes the sureties liable for the prosecution of the action, the return of the property, if return be adjudged, and the payment of the costs. And *quaere* whether the sureties would not be estopped from denying the truth of the recital?

Motion denied, with costs.

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THE NEW YORK LIFE INSURANCE CO. *a.* THE BOARD OF SUPERVISORS OF THE CITY OF NEW YORK.

*New York Superior Court; General Term, January, 1855.*

ILLEGAL TAXATION.—DENIAL OF INJUNCTION.

An injunction will not be granted to restrain the collection of a tax illegally imposed.

Application for an injunction.

The complaint set forth that the plaintiffs had been taxed upon two hundred and fifty thousand dollars for the year 1852, by the defendants the Board of Supervisors of the City of New York, whereas they could only rightfully be taxed upon one hundred thousand: and that the other defendant, Harvey Hart, receiver of taxes, was proceeding to enforce the illegal tax: and prayed the judgment of the court upon the facts set forth, that the plaintiffs were not liable to pay taxes upon any amount greater than one hundred thousand: and an

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injunction to restrain the defendants from collecting more.

The defendants demurred to the complaint.

The demurrer was argued before Mr. Justice Hoffman; who overruled it and rendered judgment for the plaintiffs as prayed. After an elaborate discussion of the merits, he thus concluded: "The next point raised by the demurrer is a denial of the jurisdiction of the court. It is insisted that this court cannot by injunction, interfere with the proceedings taken under the decision of a subordinate tribunal, acting under a statute, and clothed with the exercise of political powers.

An opinion of Mr. Justice Duer, in the case of *Douglas v. The Mayor, &c.*, has been laid before me; the facts of the case are not stated, but it is apparently hostile to the jurisdiction.

Justice Roosevelt, whose long practical experience and learning upon this subject give great weight even to a special term opinion, treats the Bureau of Assessment as exercising a quasi-judicial power, and being a court of special jurisdiction. (*Thwing v. The Mayor, Aldermen, &c.* Special term, 1854). The complaint was there dismissed, and a preliminary injunction dissolved.

The case was one, however, of gross neglect of the opportunities to make objections provided by the law.

Justice Emmett, also, in the case of *The Trustees of the N. Y. Society Library v. Mayor, &c.*, refused an injunction and dismissed a complaint, which was to restrain the enforcement of payment of taxes assessed upon the property of plaintiffs. He expressed the opinion that the property was exempt, but decided the cause, upon the cases of *The Mayor of Brooklyn v. Meserole*, (20 *Wend.* 132), and *Van Doren v. The Mayor, &c.* (9 *Paige*, 388), cited also by Justice Duer, in the case before mentioned.

It is difficult, perhaps impossible, to resist these authorities; and if there was nothing in the Code to excuse an implicit submission to them, I should allow the demurrer at once. But the new system does, I think, warrant me in saying that a doubt may exist upon the question yet. The same court now administers the law upon all the united principles of

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equity and law. If this case was before me upon an action to recover back the money paid under legal compulsion, or upon an action against an officer for seizing upon property to enforce the tax, I should decide that the money should be restored. The judges at general term, if they agreed in the opinion as to the law, would order such repayment. It does seem difficult to reconcile it to common sense to say, why the party aggrieved by an error in law, may not in the same court on the same facts be protected from paying money as well as entitled to recover it when paid.

The case of *Gardner v. Lee's Bank*, (11 *Barbour*, 567), and some other cases, are hostile in principle to this view. The view of Justice Edmonds in *Cure v. Crawford*, (1 *Code R.* 18), favors it.

It is a question not so fully decided by the judgment of the general term of this court, or by that of any higher authority as to preclude me from acting upon an inclination of opinion and nothing more, that an injunction may in this case be sustained. I shall be glad if the subject is brought before the general term for a deliberate consideration which may govern ourselves at least upon a point of signal importance, and far reaching consequences.

The demurrer will be overruled, and judgment entered for the plaintiffs without costs.

From this decision the defendants appealed to the general term.

*J. Miller*, for the plaintiffs.

*R. J. Dillon*, for defendants.

DUGG, J.—(Orally.)—After stating the facts in the case.

It has not been contended that previous to the enactment of the Code, this Court would have had jurisdiction to restrain the collection of such a tax. This has been decided in several cases. The case of *Moses v. Smedley*, (6 *Johns. Ch. R.* 28), though differing in circumstances, involved this principle; and it was there held that a court of equity could not interfere by injunction to prevent the collection of a tax assessed by the Board of Supervisors. The chancellor in that case dismissed

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the bill, for want of jurisdiction ; and his decision was affirmed by the Court of Errors.

The case of *Meserole v. The City of Brooklyn*, (26 *Wend.* 132), carried the doctrine still further. There an action had been brought to restrain the Mayor of the City of Brooklyn, from enlarging a highway known as "The Bedford Road," upon the ground that the proceedings, if persevered in, although they might not, being void, actually affect the title of complainants to their lands, a part of which had been taken for the road, would cast a cloud over the title, which would diminish the value of the property, and might be used as a means of vexatious litigation. The chancellor granted the injunction ; but when the case came before the Court of Errors, that court unanimously agreed that although the acts of the Common Council of Brooklyn were wholly illegal and void, and the corporation had no right to take the lands, still, the remedy was not by injunction, but by *certiorari* ; or if the corporation persisted in going on, by an action of trespass.

But it has been insisted by the counsel for plaintiff, that the rule has been altered by the Code, and that now the court has jurisdiction in every action where the plaintiff seeks to restrain or prevent a wrongful act ; in other words that the court, as a court of equity, has unlimited power to prevent wrong ; that it has power to prohibit any act which a court of law can punish. This court might then prevent by injunction, an assault and battery, or the publication of a libel. We cannot consent to such a construction of the Code. It was never intended by that enactment, that the equity powers vested in the courts should be enlarged. Although section 219 of the Code has been supposed, not only by counsel in this case, but by some of the judges of the Supreme Court, to have enlarged the equity powers of the courts, we do not think it has done so. That section speaks only of temporary injunctions ; and it will be found that the Code does not at all attempt to define the cases in which a perpetual injunction may be granted, but leaves them to be determined by the old rule.

We are therefore of opinion that we have no jurisdiction to issue an injunction in this case.

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Wesson v. Judd.

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WESSON v. JUDD.

*New York Common Pleas; Special Term, February, 1855.*

## DENIAL OF INFORMATION.—SHAM.

- A denial in an answer, of knowledge or information sufficient to form a belief, as to matters stated in a complaint, is not necessarily sham or evasive, unless it appears that the party had the means of obtaining information directly within his reach.
- A defendant who admits that he executed an instrument upon which he is sued, cannot deny information sufficient to form a belief as to facts stated in the instrument.
- A defendant who admits having executed an instrument similar to that upon which he is sued, cannot deny, merely upon a want of information sufficient to form a belief, that the instrument is correctly set forth in the complaint; but he is entitled to an inspection of the original to enable him to answer.

Motion to strike out an answer as frivolous.

The plaintiffs David and Andrew Wesson having procured the arrest of Jephtha Fowlkes, in the course of supplementary proceedings upon a judgment recovered by them against him, James W. Judd and Fowlkes gave an undertaking that Fowlkes should attend pursuant to direction of the judge, to be examined. Fowlkes having made default to appear, the plaintiffs brought this suit against him and Judd, upon the undertaking.

The complaint set forth the recovery of the plaintiff's judgment against Fowlkes,—the issuing of execution, and that it was returned unsatisfied,—the arrest of Fowlkes, upon a warrant duly issued by Hon. Chas. P. Daly, pursuant to § 292 of the Code,—the execution of the undertaking by the defendants, giving a copy of it,—together with Fowlkes' default to appear, &c.

The first paragraph of the answer of the defendant Judd denied, for want of information sufficient to form a belief, the allegations of the complaint as to the recovery of a judgment by the plaintiffs against Fowlkes.

The third paragraph contained a denial, for want of informa-

tion sufficient to form a belief, that Fowlkes was arrested as alleged in the complaint, and that the warrant was duly issued.

The fourth paragraph admitted that the defendant upon the occasion of Fowlkes being brought before a judge, did give a writing, but denied, for want of information sufficient to form a belief, that the writing was correctly set forth in the complaint.

*S. P. Huff*, for the motion.

*E. P. Barrow*, opposed.

DALY, J.—*Held*.:—I. That the defendant's denial that he had any knowledge or information sufficient to form a belief of the existence of the judgment upon which the supplementary proceedings were founded, was not necessarily sham or evasive. *Hance v. Remming*, (1 *Code R. N. S.* 204), was a very different case. There the defendant having entered into an undertaking in a suit between Hance the plaintiff and one Cavanagh, to pay the amount of any judgment that might be recovered against Cavanagh, after the undertaking was given, the suit against Cavanagh was prosecuted and defended, and judgment was recovered against him; and execution having been returned unsatisfied, an action was brought against Remming the surety. He employed the same attorney that had defended Cavanagh; and in his answer set up that he had no knowledge or information sufficient to form a belief whether the plaintiff had recovered a judgment against Cavanagh. The Court of Common Pleas struck out the answer as sham and evasive; as Remming had but to ask his own attorney when he prepared the answer for him to swear to, whether the judgment was recovered against Cavanagh, or not. But the party to the undertaking now in suit, was not bound to search through the public records to ascertain whether the supplementary proceedings were founded upon a judgment as alleged. Not having, as in the former case, the means of information directly within his reach, he might properly state the want of knowledge or information.

II. That the allegation that the defendant Judd had no knowledge or information sufficient to form a belief whether



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the defendant Fowlkes was arrested upon order, &c. was bad. The fact of the arrest was recited in the undertaking signed by Judd. He had admitted the fact by signing the undertaking, and could not set up in his answer that he had no knowledge or information sufficient to form a belief upon that subject. The whole of the third paragraph of the answer was therefore stricken out.

III. That the whole of the fourth paragraph must also be stricken out. The defendant could not aver that he had not sufficient information to form a belief whether the undertaking recited in the complaint was correctly set forth or not. He admitted that he executed an undertaking, and if he was in doubt as to the correctness of what purported to be a copy of that undertaking in the complaint, he should have demanded from the plaintiff or his attorney, an inspection of the original instrument, before making an answer; and if they had refused to allow him to inspect it, the court would by order compel its production, upon defendant, of a sworn copy.

The other parts of the answer were unobjectionable. The parts indicated were stricken out; but the plaintiff having asked for too much in his motion, did not recover costs.

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SHERMAN *a.* PARTRIDGE.

*New York Superior Court; Special Term, February, 1855.*

INTERPLEADER.—SALE OF GOODS.

An order of interpleader under § 122 of the Code can only be made, when it is certain that the only question is whether the plaintiff or a third person is the true owner of the debt, fund, or other property for which judgment is demanded.

When it is insisted that the defendant is absolutely liable, and is precluded from setting up the title of a third person as a defence, his application to be discharged from the suit must be denied.

It is only in an action against the defendant himself, that the question of his absolute liability can be properly raised and determined. A judge would exceed the just limits of his authority by so deciding the question upon a motion, as to put an end to the action, and bar an appeal.

When the action is for the recovery of a debt arising from the sale of goods, the purchaser cannot require his vendor to interplead with a third person claiming to be the owner of the goods. This is not a case in which an interpleader has ever been allowed, nor is it embraced within the terms of the Code.

Motion under § 122 of the Code, that one Henry Delafield be substituted as the sole defendant, and the present defendants be discharged from all liability to either party, upon their paying into court the sum of \$348 17 ; or if that relief should be denied, then that Delafield should be made a co-defendant.

The allegations of the complaint were, that one Philip N. Searle, had sold to the defendants a quantity of logwood of the value of \$500, and for a valuable consideration had transferred and assigned to the plaintiffs, his claim against the defendants, arising from the sale. That the defendants, in consideration of this assignment, had expressly promised the plaintiffs to pay them the price or proceeds of the logwood which it was averred amounted to the sum of \$499 11, for which sum, the defendant having refused to pay it upon request, judgment was demanded. .

The affidavit of one of the defendants upon which the motion was founded stated, (*inter alia*) that one Henry Delafield, a person not a party to the action, and without collusion with the defendants, demanded of them the proceeds of the logwood, alleging that it belonged to him, and that Searle had not the possession as owner, nor any right or authority to sell the same, or assign the price thereof.

The affidavits which were read on the part of the plaintiffs in opposition to the motion, stated the following facts: That they had sold to Searle for cash, a quantity of staves, and that he gave them his check for the price, the payment of which was refused. That he then gave them an order on the defendants for a definite sum as the price of the logwood. That the defendants declined to pay the order, on the ground that the logwood had not yet been fully weighed, and that it was not certain that the price or proceeds would amount to the sum mentioned, but that they expressly promised to pay to the plaintiffs the whole proceeds when ascertained, provided the plaintiffs would obtain from Searle a general order or assignment of his claims. That such an assignment which was set forth, was accordingly obtained, and that the plaintiff relying upon it, and upon the promise of the defendants, had omitted to obtain from Searle, who is now insolvent, a return of the

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staves sold to him, as they otherwise might and would have done.

*D. D. Lord*, for the defendants, and for *H. Delafield*.  
I. The case is not at all varied by the plaintiff's affidavits, the facts set forth being wholly insufficient to prove that the defendants have made themselves liable to the plaintiffs in all events for the price of the logwood, the promise they gave amounting in reality to no more than a promise to pay to the plaintiffs, as assignees, the sum to which Searle as owner of the logwood might finally appear to be entitled; and as to the allegation that they had sustained damages from their reliance on the promise of the defendants, it is too vague and uncertain to merit attention. And were it otherwise, the defendants, as the nature of the relation between the plaintiff and Searle was not disclosed to them, cannot be responsible. As the plaintiffs therefore can only maintain the action as the assignees of Searle, they stand in the same situation as Searle himself, and consequently their right to recover depends solely upon the question whether he or Delafield, as the true owner of the logwood, is entitled to the proceeds of the sale. These proceeds may justly be considered a fund of which the defendants were merely the depositaries, and as they are willing and have offered to pay the fund into court, they are entitled to be discharged. The case is plainly one of those to which the provisions of the Code apply, and in which an interpleader has always been granted.

II. If the defendants are not to be discharged, the application of Delafield to be made a party to the action by a proper amendment, cannot be denied. The action being brought for a particular fund is an action for the recovery of personal property, within a fair interpretation of the words of the Code. Delafield has, or claims to have an interest in the subject of the action, and to enable him to assert his rights, he ought to be made a co-defendant. If this cannot be claimed as his positive right, it would at least be a fit exercise of the discretion of the court.

*J. T. Williams*, for the plaintiffs. I. The material question

is, whether the defendants shall be discharged and Delafield be substituted as the sole defendant; and to grant this would be a hazardous and unequitable exercise of the discretion of the court. It would be unjust to release the defendants from a positive contract, by their reliance on which, the plaintiffs have lost the remedies which, as against Searle, they would otherwise have possessed and exercised. (*Crawshay v. Thornton*, 7 *Simons*, 391, and *Pearson v. Cardon*, 4 *Simons*, 218). It is a fatal objection to the application of the defendants that they dispute the amount of the plaintiff's claims. The plaintiffs demand a judgment for \$499 11, and the defendants offer to pay into court only \$348 17. (*Chamberlain v. O'Connor*, 8 *How. Pr. R.* 45).

II. As to the application of Delafield to be made a co-defendant, the court has no discretionary power to grant it. This is not an action for the recovery of real or personal property, and it is an abuse of language to call it so. It is an ordinary action for the recovery of a debt, not of lands, nor of specific chattels. (*Judd v. Young*, 7 *How. Pr. R.* 79).

DUM, J.—I. Taking into consideration the facts set forth in the plaintiff's affidavits, and which I think might properly be given in evidence to sustain the averment in the complaint, of a special promise, I am clearly of opinion that the motion for the discharge of the defendant, and the substitution of Delafield as the sole defendant, must be denied.

An order of interpleader under § 122 of the Code, can only be properly made when the whole controversy turns upon the right of property, that is, upon the question whether the plaintiff in the suit or the claimant whose substitution as the defendant is desired, is the true owner of the debt, fund, or other property for which judgment is demanded. When the plaintiff insists as in the present case, that the defendant by a personal contract or otherwise, has rendered himself liable in all events for the debt sought to be recovered, and is precluded from setting up the title of a third person as a bar; it would be manifestly unjust to make the order, since in the language of Lord Cottenham in *Crawshay v. Thornton*, (2 *Mylne & C.* 1), it would deprive the plaintiff of his legal remedy, and

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might involve the sacrifice of his legal rights without affording him any equivalent or compensation.

Applying these remarks to the case before me, it is only in an action against the defendants themselves, that the question whether they have not rendered themselves absolutely liable to the plaintiffs for the price of the logwood can be so determined as to secure to the plaintiffs the right of appeal to the court of ultimate jurisdiction. To deprive them of this right by putting an end to this action in its present form, and substituting Delafield as the sole defendant, it seems to me would be an arbitrary and unwarrantable exercise of judicial power. As against Delafield, the plaintiff could only recover upon proof that Searle was the owner of the logwood, or had full authority to make the sale, and the question whether even upon the supposition that Searle was not the owner, and had no such authority, the defendants were not bound to pay to the plaintiffs the stipulated price, would not be determined at all. And thus the plaintiffs might be deprived of the judgment, to which, had the action retained its original form, they would have been entitled. Whether if the plaintiffs shall succeed upon the trial in establishing the facts set forth in their affidavits, the defendants will be precluded from setting up the title of Delafield as a bar to a recovery, is a question upon which I am not to be understood as expressing or intimating any opinion. I only mean to say that as the question of the absolute liability of the defendants is distinctly raised by the complaint and the affidavits, I have no right to decide it upon this motion, and thus to prevent its decision in the regular progress of the cause.

The provisions in § 122 of the Code, are founded upon the English Statute 1 & 2 Will. IV. c. 58, and hence the decisions upon that statute have with great propriety been referred to. They appear to have settled the rule, that it is only when no other question than the right of property is meant to be litigated, that an interpleader can justly be allowed. When it is alleged that the person who seeks to be discharged as a mere depositary or stakeholder, is liable upon any ground independent of the title, the application must be denied. *Crawshay v. Thornton*, (7 Sim. 391, S. C. 2 Mylne & C. 1). *Pearson v.*

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Carden, (2 *Russ. & M.* 606). *Palorni v. Campbell*, (3 *Dowl. N. S.* 397), and *Lindsay v. Barron*, (6 *C. B. R.* 291), differ in circumstances from the case before me, but in principle are not to be distinguished. As they appear to me to have been rightly decided, it is my duty to follow them.

Nor is it only upon the ground that has been stated that I must refuse, by substituting Delafield, to discharge the defendants. Had this action been brought by Searle himself, or by the plaintiffs merely as assignees, I must still have said that the facts do not exhibit a case for an interpleader under a just construction of the Code. The plaintiffs seek to recover a debt arising upon contract, but Delafield is not "a third person, nor a party to the suit making a demand for the *same debt*," as the words of the Code require him to be, to justify an order for his substitution. As he denies that Searle had any authority to make the sale, his demand as owner is for the logwood itself, or its value, which may be greater or less than the price agreed to be paid; and at any rate is not a debt of which, as such, he may compel the payment. The words of the English statute do not at all differ in meaning from those of the Code, and the Court of Exchequer has held that by their necessary construction, they preclude a purchaser of goods from calling his vendor to interplead with a third person claiming to be the owner. And one of the learned judges truly observed, that independent of the statute, an interpleader in such a case had never been allowed in a court of equity. (*Stancy v. Sidney*, 14 *Mees. & W.* 800).

The provisions of the Code, like those of the English statute, were certainly not designed to introduce new cases of interpleader, but merely to enable defendants in cases where an interpleader is proper, to relieve themselves by a summary proceeding, from the delays and expense of a formal action.

II. The alternative motion that Delafield may be made a co-defendant, must also be denied. This is not an action for the recovery of real or personal property within the meaning of the Code. He has no interest that can be endangered or affected by any judgment that the plaintiffs may obtain, nor is his presence necessary to a complete determination of the controversy. As owner of the logwood, he must seek his

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remedies against the defendants, or those into whose hands the property may have passed.

The objection that the defendants have offered to pay into court a less sum than is demanded by the complaint, if other objections could be removed, I should by no means regard as fatal. I should then have no difficulty in directing a reference, or an issue for ascertaining the sum, which as the price of the logwood, the defendants were bound to pay.

I remark in conclusion, that unless the defendants have rendered themselves absolutely liable, which is strenuously denied by their counsel, I do not see that they can be prejudiced by the denial of this motion. If the sale made by Searle was fraudulent and void, the title of the true owner, according to the decision of this court in *Bates v. Stanton*, (1 *Duer*, 79), may be set up by them as a full defence.

I shall deny both motions without costs, and with liberty to the defendants, if they shall be so advised, to commence a regular action for compelling an interpleader.

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#### THE UNION INDIA RUBBER COMPANY *a.* BABCOCK.

*New York Superior Court; Special Term, December, 1854.*

#### JUDGMENT OF COURT OF APPEALS.—HOW CARRIED INTO EFFECT. COSTS.

The proper practice in respect to the form of entering judgment in the court below upon remittitur from the Court of Appeals, defined.

The costs of the appeal to the Court of Appeals, should be adjusted by the clerk of the court below, and inserted in the entry of judgment, in that court.

Form of judgment upon a remittitur.

Motion for judgment upon remittitur from the Court of Appeals.

The plaintiffs sued on a money demand arising on account of goods sold, and upon the report of a referee, judgment was ordered for the plaintiffs for thirteen hundred and fifty-two dollars, ninety-two cents, including costs. Both parties

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appealed to the General Term. Both appeals were dismissed and the judgment below affirmed. The defendant then appealed to the Court of Appeals. But he having served no printed copies of the case, the appeal was dismissed by the respondent by an order entered of course. In accordance with the provisions of this order, the record as returned to the Court of Appeals was transmitted to the Superior Court, under a certificate of the clerk.

The plaintiff now moves for judgment upon the remittitur, with costs of the appeal.

*T. H. Rodman*, for plaintiff.

*J. H. Ward*, for defendant.

HOFFMAN, J.—The plaintiffs recovered a judgment against the defendant, on the 22d day of December, 1853, for the sum of \$1853 92. This was an affirmance by the General Term, of a judgment obtained at Special Term on the 9th of July, 1853. The defendant appealed to the Court of Appeals, on the 24th of December, 1853. And on the 4th of December, 1854, an order of that court was made, dismissing the appeal, with costs, for want of service of printed copies of the case, as required by the 7th rule of that court, more than forty days having elapsed since the appeal was perfected. The order also directed the record and proceedings to be remitted to the Superior Court, there to be proceeded upon according to law. This has been done by transmitting to this court the record as returned to the Court of Appeals, under a certificate of the clerk.

By the 12th section of the Code, the judgment of the Court of Appeals, shall be remitted to the court below, to be enforced according to law. The provision of the Revised Statutes was similar;—that when an appeal shall have been heard and determined, all the proceedings, together with the decree or order therein, should be remitted to the Court of Chancery, where such further proceedings should be had as might be necessary to carry it into effect. (2. *Rev. Stats.*, 167, § 29).

The 469th section of the Code retains all the former rules and practice of the courts, not inconsistent with the act. And



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although the order to dismiss an appeal is entered as of course, with the clerk, yet the theory is, that it is the same thing as if made in open court, by the judges themselves. It may also be well considered that such an order is a judgment within the meaning of the 12th section of the Code. Justice Parker in *Tillsbaugh v. Dick*, (8 *How. Pr. R.*, 33,) calls a dismissal of a complaint for want of prosecution, a judgment.

The practice upon remittitur of appeals was well settled. Application was made to the Court of Chancery for an order or decree making the decree of the Court of Errors the decree of that court, and that it be carried into effect. Occasionally, the decision above rendered it necessary to make an entirely new decree, as in the case of the James will. But where there was a mere decree of affirmance with costs, the decree in the court below recited the remittitur, and the amount of the costs as taxed, and thereupon adjudged and decreed that the judgment of the Court for the Correction of Errors, and the decree of this court thereby affirmed, be carried into full execution and effect, and that the party have execution for the costs directed to be paid by the judgment of said Court of Errors, and the said decree of this court thereby affirmed. (Decree in *Gregory v. Dodge*, stated 3 *Hoff. Ch. Pr.* 220. *Bowen v. Idley*, *ibid.* 211).

In *Dale ads. Roosevelt* (1 *Wend.* 25), the practice on writs of error is pointed out. It was held that the remittitur could be filed in vacation, that an entry on the original record of the writ of error and remittitur, was unnecessary, that the costs taxable after the record had come down, were to be inserted in the remittitur, and an award of execution for such costs, I apprehend, would be proper. It appears settled law that no new rule for execution as to the original judgment was necessary. (2 *Cow.* 510).

The theory of this course of proceeding was, that the original decree remained in full force, dating from its original entry, and of course if for a money demand and docketed, retaining its lien. Then the decree made upon the remittitur operated in cases of affirmance, simply to give and declare a right to the costs of the appeal, and direct an execution to issue for them, and also where execution for recovery of money or

performance of an act had been decreed, to award execution for that also.

'I apprehend that a similar course may be pursued under the Code, and that an order may be entered upon the filing the remittitur substantially in the form used in the Court of Chancery in similar cases of appeals.

In *Hosack v. Rogers*, (7 *Paige*, 108), the chancellor adverted to the practice in the Supreme Court and the Court of Chancery upon filing remittiturs, and settled, as the future course in the latter court, that they must either be presented to the chancellor in the first instance, or the party to whom the remittitur was delivered might give notice for a regular motion day in term or vacation, that he would file the remittitur and ask for such decree or orders as he considered himself entitled to, upon it

There is one point, however, which requires consideration. The costs of the appeal have been adjusted by the clerk of this court. The question is, whether this is regular.

By the course of the House of Lords, a specific sum is usually inserted in the decree or judgment, as the amount of costs to be allowed. As there is no officer of the House authorized to tax costs, if the agents cannot agree, and the House does not fix the amount definitely, a reference is sometimes made to a solicitor agreed upon by the parties. (*Palmer's Pr.* 74, 2 *Daniel's Pr.* 1371). It appears also that the House of Lords may order a party into custody for a contempt in not paying them, or direct the recognizance to be estreated into the Exchequer. (*Ibid.* 1372).

The original 19th rule of the Court of Errors, adopted in April, 1827, directed the costs to be taxed by the chancellor or judge of the Supreme Court or clerk of the Court of Errors. (9 *Cow.* 289). This was considered to be inconsistent with the fee bill, (2 *Rev. L.* 4), directing taxation of costs in the usual manner of the respective courts. Accordingly in April, 1829, the rule was amended to conform it to the language of the fee bill, and the costs of that court were afterwards taxed by the regular taxing officers of either court. This could be done after the record had been sent down. (*Legg. v. Overbagh*, 4 *Wend.* 188).

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The Code has nowhere in terms prescribed either that costs shall be taxed, or by whom they shall be taxed. The power is deduced from the 311th section, and is considered as belonging to the clerk, from the language there used that he shall insert in the entry of judgment the sum of the charges for costs as provided in the Code, and the disbursements and fees of officers allowed by law. (*Whipple v. Williams*, 4 *How. Pr. R.*, 28. *Nellis v. De Forrest*, 6 *How. Pr. R.*, 413).

It has been decided in several cases, that the power of the clerk under the Code to tax costs is limited to a taxation upon final judgment. (*Nellis v. De Forest*, 6 *How. Pr. R.* 413; *Mitchell v. Westervelt*, *Ibid.* 265; *Burnside v. Brown*, 6 *District, January*, 1852, cited 6 *How. Pr. R.* 415; *Echerson v. Spoor*, 4 *How. Pr. R.* 361; *Morrison v. Ide*, *Ibid.* 304).

In *Van Schaick v. Winne*, (8 *How. Pr. R.* 5), Justice Harris held that the taxation of costs by a judge at chambers was a nullity. The clerk was the only officer authorized by the Code to tax or adjust costs. His authority was limited to the taxation of costs upon the entry of judgment. The amount of costs upon interlocutory proceedings should be fixed by the order allowing them, and he, as well as Justice Hand, hold that the court has clearly the power in all other cases to make a reference to the clerk to adjust the costs.

The authority to tax the costs has been for many years the subject of legislative enactment. By the 37th section of the Revised Statutes, records of judgment should be signed and the costs be taxed, by one of the justices, or by the clerk, a circuit judge or supreme court commissioner. (2 *Rev. Stats.* 282, § 37). The 8th section of the act of 1813, (1 *Rev. Stats.* 320), gave the same power to the clerks.

So in the Court of Chancery, an act of April 15, 1814, (*Sess. Laws*, 1814, 163, p. 187), authorized the chancellor to designate masters to tax costs who should have exclusive jurisdiction to do so during the pleasure of the court. (See the authority continued in 2 *R. S.* 169, § 5).

The language of the 311 section of the Code, is that the clerk shall insert in the entry of judgment the sum of the charges for costs as above provided, with the necessary dis-

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bursments and the expense of printing the papers upon appeal.

By the 307th section and the seventh subdivision, an allowance is to be made on appeal to the Court of Appeals, and such costs appear to fall within the phrase "as above provided," as well as any other. The clerk therefore has, as to these, the same authority that he has as to any other costs.

The proper mode then appears to be that the judgment of the Court of Appeals be directed to be made the judgment of this court, and that the costs of appeal when adjusted, be inserted in such judgment.\*

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\* His honor, with the concurrence of three other justices, approved of the following order: remarking that if on the presenting the remittitur, the court deemed a notice proper, the order would be so far varied as to be made an order to show cause why the judgment of the Court of Appeals should not be made the judgment of the Superior Court, and a judgment entered in the Superior Court conformably thereto; a copy of the proposed judgment to be served with such order to show cause.

TITLE OF CAUSE.

"At a Special Term," &c.

"This cause having been brought on upon the remittitur herin sent down from the Court of Appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from the judgment of this court to the said Court of Appeals, and that such appeal had been dismissed by such court with costs for want of prosecution, and that the record and proceedings had been directed by said Court of Appeals to be remitted to this court, and this court directed to enforce the said judgment of the Court of Appeals according to law. Now, therefore, on motion of Mr. Rodman of counsel for the plaintiffs, it is ordered and adjudged that the judgment of the said Court of Appeals be, and the same is hereby made the judgment of this court; and that the plaintiffs have execution against the defendants for the costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgment of this court in this cause entered the 9th of July, in the year 1853; and that this order or judgment be annexed to the judgment record herein."

THE PEOPLE *a. RESTENBLATT.**Court of General Sessions ; February, 1855.*

## INDICTMENT.—GROUND FOR QUASHING.

An indictment should be quashed when it clearly appears by affidavit that it was found by the grand jury without adequate evidence to support it.

Motion to quash two indictments.

*Mr. Graham*, for the motion.

*The District Attorney*, opposed.

STUART, J.—The defendant is before the court upon two indictments for false pretences. Counsel for the accused moves to quash both indictments, upon the ground that they were found without any proofs of the commission of the offences preferred.

On the argument of the case by *Mr. Graham* for the prisoner, and the District Attorney for the people, it was conceded and agreed on the one side and on the other, that the preliminary affidavits of the complaining witnesses, which accompany the indictment, contained all the testimony given before the grand jury, and on which they acted in ordering these bills. I have read the complaining papers with care, and it is apparent that they not only fail to exhibit proof sufficient to indict, but are without any legal evidence whatever of a violation of the statute against false pretences. This being manifest, and having regard to the concession by the learned attorney for the people—that these primary depositions contain all and precisely the same facts, matters and things testified to by the deponents when before the grand jury, and that the grand inquest had no other evidence, knowledge or information in the premises than what is expressed by the affidavits in question—it is clearly certain that the defendant has been indicted for two criminal offences, each a felony, without legal proof, and therefore without any proof, of their perpetration. And now, upon this state of facts, (given pre-

liminarily for a better view of the case), the court is moved to go behind the indictments and take judicial notice of this want of proof for the purpose of setting them aside; thus raising the question, both new and important, whether a criminal court can pass behind the record to learn if there was any proof before the grand inquest going to establish the offence alleged, with a view to quash an indictment lawful in its composition, in accordance with the rules of pleading, and importing absolute verity upon its face. The criminal books afford almost no authority for the exercise of such a power, and I cannot find a precedent among adjudicated criminal cases either in this country or England, for so bold an intrenchment of the heretofore scarcely disputed right of a grand jury to indict whom they pleased, when they pleased, how they pleased, and for what they pleased, with proof or no proof as they pleased, defying the court of which they are less than a co-ordinate branch, against all review of their acts, however demanded by the rights of the citizen, or needed for ends of public justice; nor yet is there any decision involving a principle of law or rule of criminal procedure going to interdict such innovation when prudently resorted to for the attainment of truth and the administration of that justice which is the right of all men.

An indictment, as defined in *Jacob's Law Dictionary* upon several authorities cited, is a "bill or declaration of complaint, drawn up in form of law, and exhibited for some criminal offence." "It is," says Chief Justice Holt, "a plain, brief and certain narration of an offence committed by any person, and of the necessary circumstances that concur to ascertain the fact and its nature." An indictment, in the better language of Mr. Hawkins, (*Hawk. P. C.*) "is an accusation made in a prescribed legal form, *upon evidence*, by a number of authorized persons, of some criminal offence against the peace of the people, and when preferred in court, becomes a record for purposes of criminal prosecution."

The question recurs, may a "bill of complaint drawn up in legal form" be impeached for any cause? That it may, for some reasons, will not be disputed; and if for some, why not in all cases where it is manifest that the body indicting has no

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jurisdiction over the subject matter on which the accusation is predicated. If a court may look upon the face of an indictment to see if it contains all the elements necessary to its validity, why may it not go over to the persons who preferred it, to see if they were duly authorized to do so—to learn if they were constituted of the number required by the statute, and if so, whether they were all qualified according to law and the like? This, it is said, is not denied. Very good. Why, then, has not the court power to inquire after any misconduct of one or more grand jurors, tending to vitiate their proceedings, or of others, going to the prejudice of their acts; or to discover whether, although a crime has been proved, it did not also appear that it was committed in a foreign State or country; or if perpetrated within the pale of their jurisdiction, whether it was not so ancient as to be without the cognizance of the criminal law; or if within, it had not been shown by the testimony of a witness infamous of crime and unpardoned of a conviction for felony; and further, of like matters? All this, I take it—certainly all except the latter instance—will not be denied by any one who has given the subject their attention. The ground, as it seems to me, for an interference by the court in cases of this nature is, that the grand jury is wholly without authority to indict, upon the well settled principle that no jurisdiction by any criminal magistracy can obtain over the subject matter of a criminal offence, except upon sworn legal testimony before a duly constituted authority; as no jurisdiction can be had of the body of a criminal offender, except by reason of his personal presence before the power having cognizance of the crime. If this be good law, with all the force of truth and the strength of justice, how may a grand jury indict any one of a crime, having, for want of proof, no jurisdiction of the subject matter of the offence; or, if they do, why may not a court go behind the record and relieve the accused of preceding imprisonment, with the care, expense, and degradation of a public trial? The answer is, not that there is any law to prevent, but that it has never been done, which, with this court, would be sufficient if justice to the citizen did not otherwise require; but when it is demanded by what are in my judgment the legal rights of

the accused, it is no answer, and shall not stay this court from a prudent and careful performance of its duty. It is, in my judgment, quite enough that a grand jury is licensed to act in secret upon *ex parte* testimony in respect to all matters and persons, without permitting them to indict individuals contrary to the rules of law, and where no crime has been proved;—*as for instance*, a witness testifies before the court and jury; a spectator hears a bystander say that the evidence is corruptly false; upon this, the spectator goes before the grand jury now in session, and swears that the witness testified to something which he believes to be utterly false, as a citizen standing hard by said it was so; and upon this an indictment is ordered for perjury. Is there no relief in such a case, save a public trial? Can not the court, these facts appearing, quash the indictment for insufficiency of proof? If not, why not? The only answer is that there is no authoritative precedent. If not, it is time for one; for, if controlled by nothing else, grand juries should be bound by the rules of evidence; for upon this, more than any thing else, depends the citizen's safety. In the case of Dr. Dodd, (1 *Leach*, C. L., 184), when the defendant was called upon to plead, he challenged the validity of the indictment upon the ground that it was found upon the testimony of incompetent witnesses. The court entertained the objection. The matter was argued by some of the most able lawyers at the English bar, before the twelve judges, and it was only because they decided that the evidence was legal and the witnesses competent, that the objection failed. It is said, I know, that the doctrine expressed in this case, never obtained as an authority, and does not now prevail as the law upon this subject. The contrary were quite as easily stated. In the case of Hulbert, (4 *Denio*, 133), the accused, after he had pleaded and on going to trial, sought to give evidence relative to the character and amount of proof before the grand jury, when the indictment was found, with a view to show that but one among a number of counts for as many misdemeanors had been proved before the body indicting him, which was denied; as that would be to impeach the grand jurors before a traverse jury, empaneled to try the accused. In the decision of this case, Judge Bronson took occasion to say that an indictment



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could not be impeached, unless upon motion, by showing that it was not found upon sufficient evidence, or that there was any other fault or irregularity in the proceeding of the grand jury, and added that when the ends of public justice required it, a record ought to be set aside, and when done, that was an end of it. This law is controverted by the assertion that it is but the *dictum* of a judge in respect to a matter not embraced by the question under the consideration of the courts. Granted. It is equally the opinion of one of the ablest judges that ever held a place in the Supreme Court of this state.

An indictment is the foundation (so to speak) of a criminal prosecution, and if it is not just and lawful in all its character, it ought to be broken. Touching the two under consideration, if there was any legal proof—no matter how little—I would not combat or criticise it for the purpose of granting this motion; but as there was no lawful evidence whatever before the grand jury to negative the truth of the pretences alleged, I am without doubt of the power of the court to set them aside, and am convinced of my duty in the matter. The motion to quash, is granted.\*

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SELDEN *a.* CHRISTOPHERS.—CHRISTOPHERS *a.* SELDEN.

*Supreme Court, First District; General Term, February, 1855.*  
*(Original and cross actions.)*

LEAVE TO ANSWER ON TERMS. THE TERMS SUBSEQUENTLY  
 MODIFIED.

A demurrer put in by an executor was overruled at special term, with costs, which were ordered to be paid out of the estate, leave being given to the executor to answer on payment of costs, within twenty days. The executor subsequently obtained from another judge at special term, an order allowing him to answer without present payment of costs. *Held*, on appeal from this latter order, that it should be affirmed.

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\* The District Attorney remarked, on the rendering of this decision, that his own views did not coincide with those expressed by the court, and therefore, as it was an important question, and ought to be settled by the court of last resort, he would take the liberty of reviewing the decision upon a writ of error.

Appeal from an order made at special term, modifying the terms on which, by a previous order, defendant was allowed to answer.

MITCHELL, J.—In the first action, Vermilya, the testator, had interposed a demurrer in his life-time; he then died, and the plaintiff amended his complaint and brought in the executors and devisees of Vermilya, as defendants; and to this amended complaint they put in a demurrer similar to that interposed by the testator. The demurrer was overruled on a hearing before Judge Roosevelt, on the 6th of October, with costs as against the executor, out of the estate, but without costs as against the infant defendant; and by the order Christophers was to pay the costs out of the funds of the estate and have leave to answer within twenty days, on payment of those costs. The executor and heirs then made a motion before Judge Morris, showing that the first action is on an award for a large sum of money, and the second is in the nature of a cross action to set aside the award, and that the executor can discover no present available property of the testator, from which to pay costs. Judge Morris allowed the executor and devisees to answer without the present payment of the costs, but ordered that those costs should be paid out of the estate when sufficient assets should come into the hands of the executor.

It is no objection to the order appealed from, that it was made before another judge than the one before whom the original order was made. Both orders are properly the acts of the same court,—the special term,—and not of the judges. As a matter of courtesy, the judge who heard the last motion, would have referred it to Judge Roosevelt, if he had been requested to do so, and the latter had had leisure to attend to it.

The last motion was not an attempt to review the first order, it was an application to extend the time of payment of costs on a new state of facts not before presented to the court. It was an exercise of power not much greater than that daily used in the extension of the time to answer, which could unquestionably have been allowed in this case, although the order as is usual, had prescribed twenty days as the time to

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answer. The first order saved the executor from any personal liability for the costs, and made the costs expressly payable only out of the funds of the estate, and so was based on the assumption that there were funds of the estate sufficient to pay those costs; and on this assumption it proceeded to give the defendant leave to answer on payment of these costs. Now it appears that that assumption was incorrect in fact, and the order appealed from merely carries out what the original order implies would have been the direction of the judge making it, if the facts now presented had been made known to him. It can hardly be doubted that on a motion to resettle his order with these facts before him, he would have corrected the order so as to conform to the last order.

Here the executor and the infants must abandon a defence to a claim for many thousand dollars, unless such relief be granted to them. Nor will this indulgence encourage protracted litigation. If after one failure of this kind, the executor commit another, it would be evidence that his defence was not conducted in that spirit which should entitle him to such indulgence again.

The order appealed from should be affirmed without costs.

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CURTIS *a.* LEAVITT.—LEAVITT *a.* BLATCHFORD.

*Supreme Court, First District, General Term; February, 1855.*

**SPECIAL RECEIVERS.—THEIR RIGHT TO INSTRUCTIONS.—SECURITY ON APPEAL.**

A special receiver appointed in the course of an action, to take custody of a fund in suit, is an officer of the court, and as such is entitled to the instructions of the court when the question is, what is his duty under the orders made in the cause. *It seems*, that a judgment directing the payment of money out of a fund in court, is not a judgment directing the payment of money, within the meaning of § 336 of the Code relating to the stay of execution on appeal.

Application to the court, by a special receiver, for instructions.

The facts on which the application was based, are stated in the opinion.

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*W. C. Noyes*, for plaintiffs.

*Cleveland & Titus*, for defendants.

*B. W. Bonney*, for the special receiver.

MITCHELL, P. J.—In December, 1842, John J. Palmer, after these two suits were instituted, was appointed special receiver to take and hold, under the direction of the court, certain property formerly of the North American Trust and Banking Company. The special receiver collected \$1,100,000 and upwards, and deposited it in the New York Life Insurance and Trust Company, and still has a large amount of property not yet converted into money. After a long controversy, a decree was made in both causes, sustaining the claims of creditors under the trust instruments executed by the company, and directing the special receiver, out of the proceeds of securities in his hands, to pay the costs, &c., of the parties in these actions, and afterwards to pay out of said securities to Palmer, McKillopp, Dent & Co., the amount due to them on certain trust bonds, amounting, with interest, to more than a million of dollars, rateably with certain other creditors; and with directions also, out of the securities, to make other payments.

Mr. Leavitt is not a receiver appointed in these causes, but was appointed receiver before these causes were instituted, on account of the insolvency of the company. He is not, therefore, bound (as Mr. Palmer, the special receiver in this cause, may be, when he is not interested) to obey orders made in this cause, in which he is a party, without appealing from them. Mr. Leavitt has the same right to appeal from any order made as to the funds belonging formerly to the company, as any other party to the suit has, to the extent of the interests which he represents. He has appealed from the decree of this court to the Court of Appeals, and has given security only in the sum of \$250, and under section 334 of the Code. He next gave notice to the special receiver that he had so appealed, and that he forbade any payments being made under that decree. The counsel for Curtis, Blatchford & Co., trustees, and for Palmer, McKillopp, Dent & Co., and for

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others, gave notice to him that they insisted on payment under the decree, as they regarded the security as inadequate to operate as a stay of proceedings.

The special receiver applies for instructions. He is an officer of the court as much so as the clerk of the court would be if he held the funds, and so is entitled to the instructions of the court, when the question is what is his duty under the orders of the court; in other words, what do those orders mean under this state of facts?

Section 335 of the Code declares that if an appeal be from a judgment directing the payment of money, it shall not stay the execution unless an undertaking be executed on the part of the appellant to the effect that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid, or the part of such amount as to which the judgment shall be affirmed, and all damages which shall be awarded against him upon the appeal. The appellant has not attempted to comply with the requirements of this section, and insists that it is inapplicable to his case; that the judgment in this case is not a judgment directing the payment of money, and that since it does not direct him to pay money, but that it be paid out of certain funds in the hands of the special receiver, a section requiring an appellant to undertake that if the judgment should be affirmed he would pay the amount directed to be paid and all damages, could not apply to one situated as he is. The respondents insist that the decree is for the payment of money, and so within the literal terms of this section; that a different construction would enable any one in a similar case by a frivolous appeal for which there were no grounds, to stay the execution of a decree; and that, if before the Code such a license were allowed under similar decrees, it was under the idea that then such a construction was necessary, or executors, administrators, trustees, and "other persons acting in another's right," could not stay execution in any case without such a bond; but that now under the Code, the court below may in its discretion, dispense with any security from those classes of persons, or limit the amount of the security to be given.

There is much in this argument of the respondents to deserve

the serious consideration of the court, if the question has not been substantially passed upon already in former cases in the court of chancery. But if that court has decided the point, it is most proper for us not to reconsider it, but leave a higher court to determine it, as both parties admit that our decision is appealable.

Section 334 of the Code is substantially like section 80 of 2 *Rev. Stats.*, 605, as to appeals from the Court of Chancery to the Court for the correction of Errors; and section 335 of the Code, like section 82 of 2 *Rev. Stats.* 606. The Revised Statutes not having provided for the security to be given on appeal from the Vice-Chancellor to the Chancellor, so as to be a stay, the Chancellor made the 116th rule of 1844, which is in effect the same as sections 80 and 82, of 2 *Rev. Stats.*, 605 and 606.

In *Quackinbush v. Leonard*, (10 *Paige*, 131), the Chancellor held that a decree in a suit for the redemption of a mortgage, directing the money due on the mortgage to be paid, or that the bill be dismissed, was not a decree for the payment of money, so as to require the plaintiff on appealing from his decree to the Court for the Correction of Errors to give a bond for the payment of the money mentioned in the decree, because it was not a decree upon which an execution could be issued for the money. He also held that (the mortgagee, the respondent, being in possession of the lands) the appellant was not bound to give bond for the payment of rents and against waste, under sec. 85 of 2 *Rev. Stats.*, 606, which requires such bond to be given if the decree directs the sale or delivery of the possession of any real property.

In *Wright v. Miller* (3 *Barb. Ch. R.*, 382) the decree of the vice chancellor directed E. W. Miller to convey to trustees to be appointed, part of certain trust property, and that on the coming in and confirmation of the master's report, he should pay the amount which should be reported necessary to make good the trust estate. Miller appealed to the chancellor, but gave a bond only in \$250 for costs and damages, and insisted that the master could not proceed on the reference; the vice chancellor decided that the master should proceed. The chancellor held that the decree was final; that as the new trustees were not appointed when the appeal was

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taken, and it could not then be known what would be the deficiency which Miller would be bound to reimburse, the bond given was sufficient to stay the proceedings in the court below ; and that except as to the costs to be paid by the defendant, this was not a decree for the payment of money within the intent and meaning of the 82d section of 2 *Rev. Stats.*, 606, so as to make it necessary to give security to pay the amount described, before the coming in and confirmation of the master's report, showing that some money was to be paid ; that it was not a decree directing the payment of money absolutely, and merely referring it to the master to compute the amount due (p. 389), but that the case would be different if the decree directed the payment of costs which had not been taxed, or of the amount due upon a bond and mortgage, which was a mere matter of computation (p. 390), as in *Coithe v. Crane*, (1 *Barb. Ch. R.*, 21). The chancellor acknowledged the imperfection of the Revised Statutes, as thus interpreted, and that the necessary effect was that appeals were often brought for the mere purpose of delay and vexation.

Previous to these cases, the same question had arisen in the *City Bank v. Bangs* (4 *Paige*, 285). That was an interpleaded suit, and the amount in controversy was paid into court, and invested by the assistant registrar. The vice chancellor awarded the whole fund to Bangs, and directed the other defendants to pay to him certain portions of the master's costs, on the reference, and that execution issue for such costs. Two of these defendants appealed from this order or decree, and gave bonds in \$100 only, to pay costs and damages that might be awarded against them on the appeal ; but they gave no security as to the amount in court, nor as to the costs. The chancellor held that section 82 of 2 *Rev. Stats.*, 606, "evidently was only intended to apply to those cases in which some of the parties in the cause were directed by the decree to pay money, or were personally charged with the payment of a loss which had arisen : or which might arise, in relation to a fund in court ;" and that the loss of interest on the fund might be covered by the bond given, but that new bonds should be given as security for payment of the costs awarded against the defendants, personally.

Thus there seems to have been a uniform course of decision on the equity side of this court, as to the construction of the similar clause in the Revised Statutes, since the year 1833; and this court ought hardly to depart from that course, unless a manifest error had been committed, or there were no means of correcting our error by appeal. The principle seems to be that a judgment directing the payment of money out of a fund in court is not a judgment directing the payment of money within the statutes as to stay of execution on appeal.

The appellants referred to section 285 of the Code, as illustrating section 335. Section 285 is, that when a judgment requires the payment of money, or the delivery of real or personal property, it may be enforced by execution; and that when it requires the performance of any other act, a copy of the judgment may be served and disobedience punished as a contempt; and it was argued with some force, that the language of the two sections was similar, and that the performance of the decree in this case would not be enforced by execution, as a decree directing the payment of money by one personally would be, but by service of a copy of the judgment; and if so, this was not a decree directing the payment of money, but according to section 285 a decree "requiring the performance of some other act." Somewhat similar language occurs in section 129, which prescribes the notice to be inserted in a summons. 1st. In an action on a contract for the recovery of money only, that the plaintiff will take judgment for the sum specified in the summons. 2d. In other actions that the plaintiff will apply to the court for the relief demanded in the complaint. An action for money to be paid out of a fund would fall under the first class—not under the second. The same distinction is made in subdivisions 1 and 2 of section 246.

The instruction to the special receiver must be, not to pay any sums under the decree of this court until the appeal shall be decided, or the further order of this court or of the Court of Appeals. The special receiver, and each of the parties appearing, will be allowed their costs of this motion to be paid (on the appeal being disposed of) out of the funds in the hands of the special receiver.



## MEEKS v. NOXON.

*Supreme Court, First District ; Special Term, January, 1855.*

## SERVICE OF CIVIL PROCESS.—ELECTION DAY.

Service of summons upon an elector on election day, is void.

Motion to set aside judgment and subsequent proceedings for irregularity.

The defendant was an elector residing in Saratoga County. The summons and complaint were served upon him by the sheriff of the county, on the 7th November, 1854; the day on which the general election of the State was held. No arrest was made, nor was any contemplated. Judgment was entered on failure to answer, on the 2d of December following. This judgment as well as the subsequent proceedings based upon it, were now sought to be set aside for irregularity in the service of the summons.

*Stevens & Hoxie, and J. C. Mott*, for the motion, cited 1 *Rev. Stats.* Chap. VI. Title 1, § 4.

*H. D. Townsend*, opposed. It was held by Vice-Chancellor McCoun in *Wheeler v. Bartlett*, (1 *Edw. Ch. R.* 323), that the section of the Revised Statutes above cited had reference only to process which caused duress.

CLERKE, J.—With regard to the service of civil process on election day, until 1842, the words of the statute were, that "no civil process shall be served, &c., on either of the days during which such election shall be held;" but in 1842, (*Laws of 1842*, p. 109), it was amended so as to read, "No declaration by which a suit shall be commenced, or any civil process, or proceedings in the nature of civil process, shall be served," &c. The case of *Wheeler v. Bartlett*, (1 *Edw. Ch. R.*), to which the counsel for the plaintiff refers, was decided many years before the amendment. In that case,

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the Vice-Chancellor says "that the section (as it then stood) has reference to process which causes duress." I doubt whether that section admitted of so limited an interpretation. In using so comprehensive a term as process, it may be well supposed that the legislature wished to provide not only against arrest or duress, but against any molestation that might interfere with the elector in performing the high and sacred duty which the elective franchise imposes. However this may be, the amendment of 1842 sets the question at rest. Commencing a suit by declaration caused no duress, and was equivalent to the present mode of commencing an action by summons, when there is no order of arrest.

The present case comes within the meaning of the amended section; and, as the summons was served on an elector on a day when an election was held, the process and all the proceedings under it were void. It is unnecessary to consider the other question.

Judgment and subsequent proceedings set aside, with \$10 costs of motion.

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MUNN *v.* BARNUM.

*Supreme Court, First District; Special Term, January, 1855.*

## SHAM ANSWER.—DEMURRER.

Slight circumstances indicating good faith, are sufficient to prevent a verified answer from being stricken out as sham.

The defendant cannot demur and answer to the same matter.

Motion to strike out an answer as sham.

This action was brought to recover the price agreed to be paid by the defendant to Orson D. Munn and others, plaintiffs, for two hundred and twenty-three shares of the stock of the Crystal Palace Association, at seventy-one dollars per share.

It appeared from the complaint that the plaintiffs had, in the spring of 1854, commenced a suit against the Crystal Palace Association for the purpose of preventing the payment of certain debts alleged to have been illegally contracted by

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Munn & Barnum.

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them. They obtained an injunction restraining such payment. The defendant, having been then elected President of the Association, and being desirous to compromise the litigation, agreed to purchase from the plaintiffs the shares of the stock which they then held, and which they stated to be two hundred and twenty-three in number, at the price above stated, in consideration of their withdrawing proceedings against the Association.

The answer, which was verified, alleged that the defendant was induced to enter into the contract by fraud, and that the plaintiffs did not, at the time of making the contract, own so much of the stock as they represented, but purchased it afterwards when the stock was sold at a much lower rate. It also contained a clause demurring to a part of the relief sought.

*Mr. O'Gorman*, for the motion.

*Mr. Platt*, opposed.

MITCHELL, J.—There is some reason to suppose that the answer was not put in good faith, and that what is stated as on information and belief, was never communicated to the defendant. He says he believed it from an examination of the books of the company—that examination might lead to a suspicion that the plaintiffs did not own the stock, but is very slight evidence of the fact. It is enough, however, to prevent his answer, sworn to by him, and now substantially reaffirmed by affidavits, from being treated as sham. (*Mier v. Cartledge*, 8 *Barb.*, 75, *Caswell v. Bushnell*, 14 *Barb.*, 393).

After the decision in the last case, this court adopted in this district a rule to give a preference on the Circuit Calendar to causes in which there was reason to believe that the defence was put in for delay. The plaintiffs may probably obtain relief in that way.

The answer sets up a custom as to the mode of transferring the stock. It very probably can have no influence on the case; but that may be better settled at the Circuit than on this special motion.

The answer concludes by demurring to part of the relief sought. The defendant cannot demur and answer to the same

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Binney *v.* Le Gal.

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matter; he must, unless he elect to waive his answer, strike out this demurrer. The evil of allowing it to remain, is that the plaintiffs might feel bound to have the demurrer passed on before he could go to trial.

No costs are given to either party.

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BINNEY *v.* LE GAL.

*Supreme Court, First District; General Term, February, 1855.*

PARTNERS.—AUTHORITY IN SUITS.

A judgment entered up against two partners upon an offer in writing made by one, will be set aside as irregular as against the other, unless there is evidence from which it may be inferred that he authorized or ratified the offer.

Appeal from an order at special term, setting aside a judgment and subsequent proceeding upon terms.

Judgment in this action was entered against both defendants, Le Gal and Borland, upon an offer made by Le Gal, to allow the plaintiff to take judgment. Borland moved to set the judgment and execution aside. Being required to give security as the condition on which this relief would be granted, he appealed to the general term. The facts in detail are stated in the opinion.

MITCHELL, J.—The defendants are partners, and (so far as the affidavits show), are indebted to the plaintiff for moneys of his applied in the use of the firm by the concurrence of both defendants. A summons in this action was served on Le Gal on the 20th of February, 1854, and on Borland on the same or following day. On the 22d, Le Gal, alone, but in the name of the firm, and signing for both defendants, made a written offer that the plaintiff might take judgment for \$1000 with interest and costs. This was accepted on the 24th, and on the same day judgment was entered and execution issued; when it was discovered that Borland had assigned the stock on the 23d of the month, and that the assignee was in possession.

Borland moved promptly to set aside the judgment and execution as against him, and this was granted, but only on

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the condition that he should give security to pay the amount of any recovery against him. He appeals; and the question is,—is the judgment regular as against him?

The plaintiff's attorney says in an affidavit used on the motion, that on the twenty-third of February, he "served the *defendants* with a notice of acceptance of the offer." Borland says in his affidavit that he was informed on the *twenty-eighth* of February, that Le Gal had made the offer. This last affidavit was served on the plaintiff's attorney, and he does not deny that the twenty-eighth was the first day on which Borland received notice that the offer had been made; he probably used the general terms "he served the defendants with notice of the acceptance," on the ground that Le Gal was regarded by him as the representative of both, and that service on him was service on both. It is to be inferred that no notice of acceptance was served on Borland.

Since this case was decided at special term, the subject of the right of one partner to bind another in a suit of law has been before the court at general term in *Everson v. Gehrman*,\* decided December, 1854, and it was held that he had no such power when acting against the wishes of his co-partner, and that his implied power was only to act in suits at law according to the express or implied wish of such co-partner. Here both partners were at hand, the plaintiff or his attorney had spoken with both as to some arrangement of this action, and Borland had told the plaintiff's attorney that he had the entire management of the business affairs of Le Gal and Borland, and that he could not then settle the debt, but that if he could raise half the debt he would, if Le Gal would raise the rest, and his counsel should approve it; (see La Bau's affidavit). The plaintiff was thus notified that Borland was the manager of this matter, and so far from committing his interest in it to Le Gal, he claimed to control the business, and had his own counsel to act for him. Borland, therefore, did no act to lead the plaintiff to suppose that Le Gal might act for him, but did directly the contrary. Under these circumstances Le Gal had no power to make the offer, except for himself, and

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\* *Ante*, 165.

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Gorum *a.* Carey.

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the judgment was irregular as to Borland, and should be set aside as against him without any condition. One partner has no power to make the offer to the plaintiff to take judgment under the Code on behalf of himself and his co-partner, without some evidence from which it is to be inferred that his co-partner authorized him to make the offer, or assented to it. Where an attorney appears for both, and there is no contrivance in employing him to appear, his appearance on the record may make the judgment regular.

The order appealed from should be modified accordingly without costs.

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GORUM *a.* CAREY.

*New York Common Pleas ; Special Term, March, 1855.*

FACTORS.—RIGHT OF ACTION.—VARIANCE.

An action for conversion will lie at suit of a factor who has stored property consigned to him, with a third party, from whose possession it has been taken by a wrong doer.

*Averment*, that property belonged to plaintiff. *Proof*, it was consigned to plaintiff as a factor, he being chargeable with its value whether sold, lost, or destroyed. *Held*, no material variance.

Motion for a new trial.

This was an action for damages for taking a quantity of ultra marine blue, belonging to the plaintiff, and valued in the complaint at \$153.

On the trial of the cause, it appeared in evidence that the plaintiff at the time of the alleged conversion carried on a commission business in paints and ultra marine blue. The blue referred to in the complaint was consigned to the plaintiff for sale, and was by him stored with one James Byrne, at his store. Byrne subsequently sold out to the defendant, the stock, fixtures, &c., of his store, mentioning to him that the boxes of blue, were there on storage, and were not included in the sale. The defendant, however, afterwards sold them.

The plaintiff having been examined by the defendant, was asked upon cross examination, whether he was not charged by his consignors with the value of all the blue sent to him, and required to pay for it, whether sold, lost, or destroyed. The

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Gorum & Carey.

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question was objected to, but allowed, and exception taken. The plaintiff replied that he was so charged.

The defendant asked a dismissal of the complaint, on the ground:

That the plaintiff had no such interest in the goods at the time of the alleged conversion as entitled him in any case to recover.

That if he had any right of action, it was by virtue of a special property in the goods which should have been set up in the complaint.

This motion was denied and exception taken; and the jury having found for the plaintiff, the defendant moved for a new trial.

*S. C. Gerow*, for the motion.

*S. B. Brophy*, opposed.

DALY, J.—There could be no doubt of the plaintiff's right to maintain an action in his own name for the conversion of this property before it was placed upon storage, it having come into his possession as a factor, for sale on commission. That he had parted with the actual possession, by storing the property with Byrne, is immaterial. The right of action does not depend upon the fact of possession, it grows out of the right to the possession. Thus, where goods are consigned to a factor, he may bring an action against a wrong doer for converting them, though the property never came into his possession. It is sufficient that it was the intention of the consignor, that a special property should vest in the consignee as a security for advances or otherwise. (*Bryans v. Nix*, 4 *Mees. & W.* 775; *Evans v. Nichol*, 4 *Scott, N. R.* 43; *Russel on Factors*, 252). And so an action for conversion will lie at the suit of party who, having the possession of property with the consent of the owner, temporarily places it in the hands of a third party, from whose possession it is taken by a wrong doer. (*Benton v. Hughes*, 2 *Bing.* 173; *Sutton v. Buck*, 2 *Taunt.* 302); which is substantially the present case.

The averment in the complaint that the defendant took certain property, describing it as *belonging to the plaintiff*, is a

sufficient statement of the plaintiff's interest or of his possessory title. It is not alleging that he was the absolute owner ; or if this averment should be treated as equivalent to an allegation that he was the owner, the proof shows that he had acquired such an absolute title to the property as would enable him to bring this action.

The plaintiff was asked, while under examination, whether he was not charged and required to pay for any portion of the property consigned to him which should be lost. To this question the defendant objected. The objection was to the nature of the inquiry ; for there is nothing appearing in the case to show that any objection was made to the form of the question, and as the inquiry related to the terms or conditions upon which the plaintiff acted for his consignors in the sale of property of this description, the inquiry was pertinent and proper. The plaintiff answered that they charged him not only with what was sold, but also with what was lost or destroyed. If by the understanding that subsisted between him and his consignors, he was held accountable for the loss or destruction of any part of the property consigned to him, then upon the conversion of this property by the defendant, the plaintiff became liable to his consignors for the full value of it, and had thereby acquired such an absolute interest in it as to entitle him to bring an action for the damages he had sustained by the conversion of it. (*Booth v. Wilson*, 1 *Barn. & Ald.*, 58). Either upon this ground, or as a party having a special property in the goods and entitled to the possession, the plaintiff was the real party in interest within the meaning of the Code.

I regret, however, that I shall have to send this cause back for the want of sufficient proof of the value of the goods. The only witness who testified upon the subject of value, was acquainted merely with the value of foreign blue. He stated that the foreign blue was a better article than the domestic, and that he knew nothing about the value of the domestic article. There was, in fact, no evidence from which the jury could determine the value of the property converted, and the case will have to go back for more explicit proof upon that point.



## MORAN a. ANDERSON.

*Supreme Court, Special Term ; March, 1855.*

## PLEADING.—FRIVOLOUS DEMURRER.

The proper mode of raising an objection to the amount of the plaintiff's claim, is by answer.

Motion for judgment, on account of the frivolousness of a demurrer.

This was an action against the acceptor of two bills of exchange. The complaint contained three counts. The first claimed interest from the 18th of August, 1854, the date of the delivery of the bill to the plaintiffs. The second claimed interest from the 31st of August, 1854, the date of acceptance by the defendants, and the third claimed as damages the fees of protest.

To this complaint a demurrer was interposed, that the complaint did not state facts sufficient to constitute the cause of action therein alleged. The plaintiffs moved for judgment, on the ground of frivolousness of the demurrer. The only question was as to the claim of interest and protest fees.

*Lebbeus Chapman, Jr.*, for the motion.

*J. Coit*, opposed.

CLEEKE, J.—The first two objections to the complaint are merely objections to the amount of damages claimed, and this is no less the case with the third.

No doubt the question of damages in lieu of exchange and re-exchange, ordinarily arises in regard to the drawer and indorsers; but the acceptor is liable, at all events, for the expenses of the protest, with interest.

The third objection therefore is also a mere objection to the amount claimed, which of course can be taken advantage of by answer, and adjusted at the trial.

Motion granted, with liberty to defendants to answer in ten days, on paying \$10 costs.

## FRY a. BENNETT.

*New York Superior Court ; General Term, February, 1855.  
Again March, 1855.*

## DEPOSITIONS DE BENE ESSE.—VINDICTIVE DAMAGES.

What is *satisfactory proof* of the inability of a witness to attend a trial, for the purpose of rendering his deposition taken *de bene esse*, admissible.

In an action against the proprietor of a newspaper for libel, an article published in his newspaper, if sufficiently connected with the defendant by proof, may be read in evidence to show the circulation of the paper, and the proprietor's income from it.

In an action for libel where actual malice has been proved, the jury are at liberty to give vindictive damages.

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After a new trial is ordered, for error in admitting a deposition upon insufficient proof that the witness was absent from the State, a motion for leave to supply such proof and thus cure the defect, will not be granted.

I. *February*.—Motion for a new trial.

This was an action brought by Edward P. Fry, manager of an Italian Opera Company, against James Gordon Bennett, editor and proprietor of the New York Herald, for the publication of twelve successive libels upon the plaintiff in his private character, and as manager of the opera.

A demurrer to the answer of defendant was interposed, upon which the plaintiff had judgment (5 *Sand.* 54), the usual leave to amend being given.

An amended answer having been put in, the cause came on to be tried before Ch. J. Oakley and a jury, on Dec. 5, 1853, the trial continuing eight days.

In the course of the trial the counsel for the plaintiff called as a witness, Sheridan Corbyn, who testified:—"I am acquainted with Maurice Strakosch; he is in Cincinnati, Ohio." On cross-examination, he said, "I last saw him six weeks ago, here; his wife told me he had gone to Cincinnati. I inquired for him this morning. She did not tell me when he went. That is all the knowledge I have."

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The counsel for plaintiff then offered to read the deposition of Maurice Strakosch, which had been taken *de bene esse*, prior to the trial. Defendant's counsel objected on the ground that the absence of Strakosch had not been sufficiently proved.

The objection was overruled and the deposition read, under exception.

The counsel for plaintiff also, in the course of the trial, offered to read in evidence an article from the New York Herald, of Dec. 16, 1851, for the purpose of showing the circulation of the paper in 1848 and 1849, in which years the alleged libels were published, and its income. The counsel for defendant objected, on the ground that the defendant was in no way connected with it by proof, and that it was irrelevant. The judge overruled the objection and the defendant's counsel excepted. The article was then read.

The counsel for defendant requested the judge to charge the jury :

That if they should find any ground in this case for giving damages to the plaintiff against the defendant, their verdict should be for such sum only as would compensate the plaintiff for the injury which he has sustained ; and that the jury were not at liberty to give to the plaintiff any further sum by way of punishment of the defendant, or by way of vindictive damages, or as smart money.

His honor declined to give this instruction. Upon the question of damages his charge was as follows :

"The plaintiff here has not proved any specific loss in regard to his business as an opera manager ; indeed it would be very difficult to prove that any person did not go to the opera, because the plaintiff's course had been criticised and animadverted upon by the defendant.

But in estimating the damages, you are to look to the character of the libels and the business of the plaintiff, not giving way to any feeling of prejudice, but examining the whole matter like business men, and so drawing your inference as to damages. It has been contended by the counsel for the defendant, that the jury are not at liberty to go beyond what are called actual damages. As I understand it, that has not

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been the course pursued by the courts in this State heretofore. What it may be hereafter, I cannot say—in regard to this matter, it strikes me that there must be some qualification to that rule; because the consequence of it would be, that in all cases wherein no specific injury could be proved, the damages would be merely nominal. If the jury in this case were not allowed to form any judgment as to damages, except so far as the plaintiff proved that he sustained an injury in dollars and cents, they could have no basis on which to stand and their verdict would be merely nominal. I have always held the rule in such cases to be, that the jury could look at the whole character of the transactions, and that they could take into consideration all the proof before them of any malicious and actual intent to injure the plaintiff. General malice against the plaintiff may not be proved; but actual malice in making the publications complained of, may be proved. Malice, so far as the law requires it to exist to sustain the action, is always implied, because every man who slanders a neighbor, or who publishes a libel against a neighbor, the law presumes to do so from malicious motives. There may be a different rule as to damages, where there is actual malice existing; because, if a man by mistake, publish a libel, the law would fix malice upon it only so far as to make him responsible; but it would be a different thing, if instead of publishing it by mistake he did so with a view to injure the plaintiff. It is contended that there is proof of that kind bearing on the defendant, and it is derived altogether, I understand, from the deposition of a German witness, Strakosch. You will examine that evidence very carefully, and see whether, taking his examination in chief and his cross-examination, reliance can be placed upon the representation he makes, that Mr. Bennett declared his intention to finish, or otherwise injure and break down the plaintiff. If it should come up to that, then the defendant stands before us as a man who deliberately undertook to do an injury, and if he fail to prove his allegations to be true, he cannot escape with nominal damages. The whole question of damages is entirely within your sound discretion. If you find for the plaintiff, you will assess such damages as the occasion requires.”

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The jury having found a verdict for the plaintiff for \$10,000 damages, the defendant moved, at special term, for a new trial. His motion was denied *pro forma*; he appealed to the general term.

*D. D. Field, J. Townsend and B. Galbraith*, for appellant.  
*A. L. Jordan and F. R. Sherman*, for respondent.

By THE COURT.—BOSWORTH, J.—The points most strenuously insisted upon in support of the motion for a new trial, are :—

First. That neither the matter stated in the eighth, nor that stated in the eleventh cause of action, and alleged to have been published by the defendant, is libelous. And that damages having been assessed generally on all the causes of action set forth in the complaint, the judgment must be reversed.

Second. That the deposition of Strakosch was improperly admitted in evidence.

Third. That it was erroneous to allow the plaintiff to give evidence of the income realized by the defendant from the publication of the New York Herald.

Fourth. That in a civil action for a libel, a jury have no right to give punitive damages, or damages by way of punishing a defendant, for a deliberate purpose to injure the plaintiff, wound his feelings, and subject his character to reproach; and that the court erred in refusing to charge the jury that damages could not be given for such a cause.

Fifth. That the damages are excessive, and that the defendant should have a new trial on that account, if no other.

We understand the court to have decided, when this case was formerly before the general term, that the matter set forth in the eighth and eleventh counts, and in each of them, and alleged to have been published by the defendant, is libelous. (*Fry v. Bennett*, 5 *Sand. S. C. R.*, 54, 56, 75).

Of either count, we deem it sufficient to say that, assuming the extrinsic facts which are averred to be true, the words published are susceptible of the construction and meaning imputed to them by the pleader. The jury having found these facts to exist, and that the words were used in the sense im-

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puted to them, the judgment cannot be disturbed merely on the idea that either of these counts is bad in substance.

Strakosch was examined *de bene esse* as a witness in this action, and the plaintiff offered his deposition in evidence, after having proved by Sheridan Corbyn that he knew Strakosch, and last saw him in this city about six weeks previously. That on the morning of that day he called at the house of Strakosch, and the wife of the latter told him that Strakosch had gone to Cincinnati. The defendant objected to the reading of the deposition of Strakosch, on the ground that his absence had not been proved. The court admitted the evidence, and the defendant excepted.

The statute on the subject declares that such a deposition may be read, "after it shall have been satisfactorily proved that such witness was unable to attend such trial or assessment of damages, personally, by reason of his death, insanity, sickness or settled infirmity, or that he has continued absent out of this State, so that his attendance at such trial or assessment of damages could not be compelled by the ordinary process of law." The right to read this deposition depends, in this case, upon the question, whether it was "satisfactorily proved that Strakosch had continued absent out of the State, so that his attendance at the trial could not be compelled by the ordinary process of law." By satisfactory proof, must be meant evidence recognized by law as competent in its nature to prove the fact, and sufficient to *prima facie* establish it.

The witness, Corbyn, does not state where he lived, how often he had been in the habit of seeing Strakosch, nor that his relations with him, nor that his own business was such that he would have been likely to have seen him had he been in the city during the two or three weeks preceding the trial. He does not appear to have even inquired when Strakosch left for Cincinnati. For aught that the wife of the latter is testified to have said, he might as well have left the previous day as before the cause was noticed for trial. The statute requires proof of more than the actual absence of the witness from the State on the day the action is tried. Such a continued absence must be proved, that ordinary diligence to procure his attendance by process of law would be ineffectual. The evidence to

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give a right to read the deposition must be such as would make it erroneous to reject the deposition. Giving to the declarations of Strakosch's wife the fullest effect, no one can conjecture from it when Strakosch left the State. No good reason can be assigned for receiving her declarations as proof, when she might have been called to testify to the fact, if it was as she is represented to have stated it. The statute, by requiring the fact to be "satisfactorily proved," should not be construed to admit of mere hearsay evidence, when direct and competent evidence appears to have been as easily attainable.

In *Guyon v. Lewis*, 7 *Wend.*, 26, the deposition was taken and cause tried before the existing statute was enacted. (*Id.* 28). The deposition was taken in August, 1828, and the cause was tried in January, 1829. The plaintiff testified to the court that the witness, immediately after being examined, told the plaintiff he was going up the North river, and expected to leave the State; that previously he was in the habit of seeing him, but had not seen him since. (*Id.*, 28). He was a transient person; had no fixed habitation anywhere, and was a journeyman carpenter, seeking employment. That was held sufficient. In *Jackson v. Rice*, 3 *Wend.*, 180, a deposition of Richard Harrison, taken under the act to perpetuate testimony, (1 *Rev. Laws*, 455), was offered in evidence, and rejected. The preliminary proof was that of a witness who proved that Mr. Harrison was between seventy-five and eighty years of age, and that the witness believed, from the ill state of his health, and the infirmities consequent upon his advanced age, he was unable to attend at the circuit as a witness. He had not, however, seen Mr. Harrison in several years, and did not personally know the state of his health. The deposition was rejected. The court said, "for aught that appeared, he might, although eighty years of age, have attended the court. At all events, the judge was not bound to presume him unable to attend. The plaintiff should not rely upon presumption where it was his duty to produce proof."

In *Jackson v. Perkins*, 2 *Wend.*, 308—315, a deposition of Mrs. Vischer, taken under the same act, was offered in evidence. It was allowed to be read, on a stipulation of the plaintiff's counsel that a judgment of nonsuit might be entered

if the Supreme Court, on a case made, should be of the opinion that the deposition ought not to have been received. The evidence of her inability to attend was, that she was over seventy-four years of age; and one of the witnesses testified that from his knowledge of her situation and infirmities, he believed she could not endure a journey from Albany to Ogdensburg, without the most serious injury to her health. This was held to be sufficient. (See *Clarke v. Dibble*, 16 *Wend.*, 601; *The People v. Hadden*, 3 *Den.*, 225). I think the spirit of these decisions requires legal proof, as contradistinguished from mere hearsay evidence or belief, especially when it is apparent that it is as easily attainable as the inferior proof which may be offered. The mere declaration of a third person should not be received as competent, and certainly not as satisfactory proof of any fact, when such third person can be as easily procured to testify to the fact as the one offered to prove his declaration respecting it. In this case, all the proof that was given of the continued absence of Strakosch from the State was the declaration of his wife that he had gone to Cincinnati, (not saying when he went), and that the witness had not seen him in six weeks. (*Robinson v. Marks*, 2 *Mood. & Malk.*, 375, and 1 *Campb. R.*, 172).

Allowing such testimony, would furnish opportunity for collusion, and violate the rule that mere hearsay evidence is inadmissible, without the slightest necessity for it, in a case in which it was just as feasible to call the party who made the declaration as some one who heard it made. Testimony by his wife, that Strakosch left the city, avowedly to go to Cincinnati, stating when, that she had not seen or heard from him since, or had received letters from him bearing the Cincinnati post office stamp, would undoubtedly be satisfactory proof. We are of the opinion, that on the evidence given, the plaintiff was not entitled to read the deposition.

The defendant is therefore entitled to a new trial, on account of the admission of this deposition in evidence. This conclusion renders it unnecessary to pass upon any of the other questions argued on the appeal, except such as may arise upon a second trial, and in respect to which the ruling of the court on such trial may properly be required.



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A New York Herald, of the date of Dec. 15, 1851, purporting to state its average daily circulation from 1842 to 1851, inclusive, and the annual receipts for it in 1835, the first year of its existence, and also in the year 1851, was offered in evidence "for the purpose of showing the circulation of the Herald in the years 1848-49, and the income of the office."

It was objected to, "on the ground that the defendant was in no way connected with it by proof, and that it was irrelevant." The objection was overruled, and the defendant's counsel excepted. It was then read, "to show the circulation of the paper and its income." The proof sufficiently connected the defendant with that number of the Herald. The paper was "relevant," and was competent evidence to show the circulation of the Herald, and of the extent to which the libelous matter had been published. So much of the extract read, as related to this point, was proper evidence.

The objection was not taken that the passage relating to the receipts of the Herald should not be read, but the objection was to the whole article. In not attempting to discriminate between the different points of it, the objection seems to have assumed, that as a whole it was not admissible for any purpose, and the ground of objection taken, was that it was irrelevant.

Whether the part relating to the receipts of the office, if specially objected to, should have been excluded, or whether its admission can be seen to have so prejudiced the defendant that, treating this as a motion for a new trial on a case, as well as an appeal from the judgment, a new trial should be granted, will depend upon considerations connected with the charge on the subject of damages, and exceptions taken by the defendant to the refusal of the court to charge on that branch of the case, as requested.

The defendant requested the court to charge the jury, "that if the jury should find any ground in this case for giving damages to the plaintiff against the defendant, their verdict should be for such sum only as would compensate the plaintiff for the injury he has sustained therefrom, and that the jury are not at liberty to give to the plaintiff any further sum, by way of punishment of the defendant, or by way of vindictive damages, or as smart money." The court refused so to charge, and

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the defendant excepted. It is not contended that the terms of the charge, as given, are particularly exceptionable.

- The jury were instructed that the plaintiff had not proved any specific loss to his business as an opera manager. "In estimating the damages, they were to look at the character of the libels and the business of the plaintiff, not giving way to any feelings of prejudice, but examining the whole matter like business men, and so drawing their inference as to damages. That the court had always held the rule in such cases to be, that the jury could look at the whole character of the transactions, and that they could take into consideration all the proof before them of any malicious and actual intent to injure the plaintiff; that it was contended the evidence of Strakosch proved actual malice, and an intention to injure the plaintiff and break up his business. They would examine this evidence carefully, and determine whether it should be credited, and whether they could 'rely upon the representations he makes, that Mr. Bennett declared his intention to finish, or otherwise injure and break down the plaintiff.' If it should come up to that, then the defendant stands before us as a man who deliberately undertook to do an injury; and if he fail to prove his allegation to be true, he cannot escape with nominal damages. The whole question of damages is entirely within your sound discretion. If you find for the plaintiff, you will give such damages as the occasion requires."

If the charge, as given, was not erroneous, and was as favorable to the defendant as he could properly require, then the question arises whether there was any error in refusing to give the instruction sought, or whether the not giving of it may be reasonably inferred to have been a substantial prejudice to the defendant. I state the latter alternative, because the action is before us upon a case, as well as upon exceptions to the decisions of the court.

The case does not show nor state any thing to legally justify the inference that the plaintiff urged the jury to apply any other consideration in estimating the amount of damages than those which the charge, as given, approved, or insisted to the court that any instructions should be given, variant from those which the defendant especially asked the court to give, unless

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it is to be inferred from the fact of the request itself. I cannot believe that when a charge, unexceptionable in itself, has been given, it is error not to go further, and charge a proposition, which, as an abstract one, is sound, when the converse of it has neither been asserted by the adverse party nor its application invoked to the disposition of any part of the case.

Unless the defendant, in his request to the court to charge that in addition to compensating the injury, the jury were not at liberty "to give any further sum by way of punishment of the defendant, or by way of vindictive damages, or as smart money," used these three alternatives as synonymous expressions, then it was not erroneous in any view to charge as requested, if "vindictive damages," or damages "as smart money," could properly be given. Unless his proposition as an entire one was sound, it was not error to refuse to instruct the jury to adopt and be governed by it. We do not understand the learned counsel for the defendant to deny that in estimating damages in an action of libel, the jury are not only to consider and compensate any actual and pecuniary loss, but if the injury was wilful or intentional, they may consider the mental sufferings of the plaintiff, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort.

But he insists that when the jury, in the exercise of a sound discretion, have arrived at what, in their judgment, is a proper compensation—having reference to all these circumstances—their duty and power end; and they can add nothing to such compensation to punish the defendant for the public good, by deterring him from doing similar wrongs to the same plaintiff or to others.

One consideration naturally suggests itself upon the mere statement of these propositions. A plaintiff who has been injured by a tort or wrong of a defendant, is entitled in all cases to his actual damages. If these include compensation for mental suffering, and a consideration of the circumstances of indignity under which the wrong was done, the public disgrace inflicted, and other actual discomfort produced, the plaintiff should be compensated at all events, whether the wrong was

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wanton, or was done believing the charges published to be true.

In either case, the mental suffering must be as great, the circumstances of apparent indignity are the same, and his disgrace will be as absolute and mortifying in the one case as the other, until his character has been vindicated by a verdict establishing the falsity of the calumnies charged against him. If such considerations are not constituent elements of damage, and if a person who has been injured in these respects, is not to be compensated by damages, as a matter of strict legal right, and if a defendant is to be exonerated from such damage, when the injury was not wanton, and is to be subjected to them when it was, then such damages may not inaptly be termed punitive, or vindictive, or damages given as smart money.

If the right to them does not result from the fact of the wrong, and the suffering and disgrace caused by it, then they are not given to compensate for such injuries, as a matter of course, merely because he wrongfully caused them, but because he caused them from a deliberate purpose to inflict them, without anything to palliate or mitigate his conduct. Logically speaking, such damages when given, are awarded full as much to punish a defendant as to compensate a plaintiff; and they are given as much by way of smart money, as because the plaintiff is entitled to them as an indemnity, inasmuch as they are given in consequence of the wantonness of the wrong, and not merely on account of the sufferings, discomfort and disgrace caused by them to the plaintiff. A reference to some of the cases will show that the decisions in the courts of this State, on this point, have been uniform. *Tillotson v. Cheetham*, 3 *Johns. R.*, 56, was an action for a libel. No plea was put in, and a writ of inquiry was executed before Ch. J. Kent and a jury. The judge charged the jury, that the case "demanded from the jury exemplary damages;" \* \* \* \* "that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious effect which a publication of this kind was calculated to produce in society." The defendant moved to set aside the inquest, and insisted that "the charge of the judge was incorrect in stating that the plaintiff was entitled to exemplary

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damages, on account of the injurious tendency of such publications to the community. In a private action, the party can recover only for the private wrong; he has no concern with the public offence, for which the defendant must atone on the indictment."

The motion was denied. Kent, Ch. J., after citing cases, which, in his view of them, sanctioned the doctrine contained in this part of the charge, remarks, that "it is too well settled in practice, and is too valuable in principle to be called in question." The report of the case states, that "Thompson, J., and Van Ness, J., declared themselves to be of the same opinion." Spencer, J., said, that "in vindictive actions, such as for libels, defamations, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury that they are to inflict damages for example's sake, and by way of punishing the defendant."

This decision was made in 1808, and seems to be a direct adjudication of the question presented in the request to charge.

In *Hoyt v. Gelston*, 13 *Johns. R.*, 141, 151, which was an action of trespass for seizing a vessel, &c., the plaintiff's counsel admitted "that the defendants had not been influenced by any malicious motives in making the seizure; and that they had not acted therein with any view or design of oppressing or injuring the plaintiff. The presiding judge held, that such admission precluded the plaintiff from claiming any damages against the defendants, by way of punishment or smart money; and that after such admission, the plaintiff could recover only the actual damages sustained, and he gave that direction to the jury."

In *Wory v. Jenkins*, 14 *Johns. R.*, 352, being an action of trespass for beating the plaintiff's mare, by reason whereof she died, the mare was proved to be worth \$50 or \$60. The judge told the jury the plaintiff was entitled to recover the value of the mare; and "if they believed as he did, that the defendant had whipped her to death, it was a case in which, from the wantonness and cruelty of the defendant's conduct, the jury had a right to give smart money." They found a verdict for \$75. A motion was made to set aside the verdict, for excessive damages and misdirection of the judge. The court said, "We think

the charge of the judge was correct; and we should have been better satisfied with the verdict if the amount of damages had been greater and more exemplary."

In *Woodward v. Paine*, 15 *Johns. R.*, 494, the same instruction was given to the jury, and the correctness of the decision affirmed.

In *Root v. Ring*, 4 *Wend.*, 113, which was an action for a libel, the presiding judge, after giving his views of the evils of a bitter and unmitigated aspersion of private character, through the medium of newspapers, stated in his charge, that "in a fitting case a jury could render no more meritorious service to the public than in repressing this enormous evil. It can only be done by visiting with severe damages him who wantonly and falsely assails the character of another through the public papers." No exception was taken to this part of the charge.

The chancellor, in his opinion, stated the rule to be, that "the jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages, by way of punishment, to the defendants. This is usually denominated exemplary damages, or smart money."

In *Fero v. Ruscoe*, 4 *Comst.* 162, which was an action for slander, the judge charged, that "the failure to establish a justification was, in law, an aggravation of the slander, and that the defendant was not entitled to any benefit from the evidence given, to make out a justification, if the jury believed that it failed to make out a full justification." An exception was taken to this charge.

The court of appeals held the charge to be correct, and said that an attempt to justify, though honestly made, was an aggravation of the original wrong. If the defendant makes a mistake, it is at his own peril.

In *Allen v. Addington*, 11 *Wend.*, 380, an action for falsely representing the credit of one Baker, whereby the plaintiff was induced to sell him goods to the value of \$2,000, the judge instructed the jury that "if they should consider the plaintiff entitled to recover, he would be entitled not only to the amount of the goods sold, with the interest of the same, but also to exemplary damages." The defendant excepted to the charge,

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and the jury found a verdict for the plaintiff for \$2,564 84 damages.

When the cause was before the Supreme Court, for a new trial, that court held that the rule of damages stated to the jury was not objectionable. A writ of error was brought to the court for the correction of errors. (7 *Wend.*, 26, 199).

The judgment was reversed on the sole ground that the second count was bad in substance; but the third count being deemed sufficient after verdict to sustain the judgment, the record was remitted to the Supreme Court, with liberty to the plaintiff to apply there to amend the *Postea*, so as to apply the verdict to the third count, (the first count not having been proved), and to render judgment thereon; and if such leave was refused, to apply for a new trial, and for liberty to amend his declaration before the awarding of a *venire de novo*. (11 *Wend.*, 421). Application was made to the Supreme Court for leave to amend the *Postea*, and enter judgment on the third count, which was granted. (12 *Wend.*, 215).

This seems to be a direct affirmance of the proposition, that in an action of tort, although it affects property only, and the actual damages can be ascertained, exemplary damages may be given, in a case in which the tort resulted from a purpose to deliberately and intentionally injure the plaintiff. Although the doctrine that exemplary or vindictive damages may be given in actions of tort, when the wrong was wantonly or maliciously committed, has been uniformly acted upon at *nisi prius*, and sanctioned both by the Supreme Court and the court of last resort of this State, its justice or any direct authority for it, has recently been denied in *Dain v. Wykoff*, 3 *Seld. R.*, 193, by an eminent judge of the Court of Appeals.

We have also been favored with the opinion of Mr. Justice Jewett, and that of Mr. Justice Mason, in the case of *Taylor, Hale and Murdock v. Church*. That was an action for libel. The judge charged, that "If the jury were satisfied that the defendant was influenced by actual malice or a deliberate intention to injure the plaintiffs, they might give such further damages (in addition to a full compensation for the injury) as are suited to the aggravated character which the act assumes, and as are necessary as an example to deter from the doing of

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such injuries." To this there was an exception. Mr. Justice Jewett held this part of the charge to be correct; and Mr. Justice Mason held it to be clearly wrong. A note of the reporter states, that five members of the court did not express a concurrence with either judge on the question now under consideration. All the judges agreed with Mr. Justice Jewett in granting a new trial, on another ground, stated in his opinion. How many of the judges were present on the argument of that case, or took part in the decision of it, the reporter's note does not state.

If the Court of Appeals has not directly affirmed the contrary of the instruction sought on the trial of this action, neither has it affirmed that such an instruction would be proper. To instruct a jury, as the judge before whom this action was tried was requested to charge the jury in this case, would be directly in conflict with the law, as it has been uniformly stated to juries, in such actions in this State, from the earliest period of its judicial history, so far as the practice is evidenced by reported decisions.

Under such circumstances, we do not feel at liberty to disregard a rule so long and uniformly held, and directly affirmed by the Supreme Court of this State, half a century ago, and if not expressly decided, at least clearly approved by the court for the correction of errors, in *Allen v. Addington*, and in *Root v. King*. (See *Day v. Woodworth*, 13 *How. U. S. R.*, 371, 372; *Austin v. Wilson*, 4 *Cush. R.*, 273, and the cases cited by counsel in *Randall v. Stone*, 1 *Selden*, 18).

If in actions of libel and slander, and in other actions of tort for injuries to the person, or to character, damages may be given when the act was wanton or actually malicious, which would not otherwise be allowed, although in each case the actual pecuniary injury, the extent of personal suffering, the attendant circumstances of contumely and indignity, and the public disgrace, be precisely the same in the one case as in the other, it is of no practical consequence whether such damages be termed punitive, vindictive or compensatory. By whatever name they may be designated, they are manifestly given on account of the wantonness or malice of the defendant's conduct, and the very rule which determines whether they may



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be given or must be withheld, has no real principle on which it can stand, if it be conceded that they cannot be given by way of example, or to punish atrocity of conduct.

While such damages are allowed to be recovered, it cannot be an indifferent consideration whether a defendant is rich or poor. Damages which would be exemplary, when inflicted upon a person in moderate circumstances, would be trivial, and in no practical sense exemplary, when imposed upon a person whose property and income were very much larger.

Who the parties to a controversy of such a character as this, are, what are their pursuits and positions, and what the influence resulting from them by a libel published by either of the other may be, are not unimportant parts of the transaction itself. Such considerations sometimes give to a libel and slander all that it has of a substantial interest or importance; and sometimes they are of such a character, that however gross the terms of the libel, they alike fail to give respectability to the action, or excite interest as to the defence.

In considering the question raised by the exception to the refusal to charge as requested, we have not referred to the decisions of the courts of any other State. We have forbore to make such a reference, for the reason that the decisions of the courts of this State have been uniform, and reach back to a period so remote, that we do not feel at liberty to treat the question as an open one in this State, notwithstanding the doubts recently expressed by some members of our Court of Appeals in relation both to the justice of the rule, and the existence of any authority by which it can be upheld.

A new trial is granted, on the ground that the deposition of Strakosch was improperly admitted. A new trial being granted on that ground, it must be with costs, to abide the event of the action.

HOFFMAN, J.—As I concur with my brethren in their conclusions upon every point of the cause, and consider the reasons assigned by Mr. Justice BOSWORTH as sufficient to sustain such conclusions, it might appear needless to add anything to the opinion delivered. But the leading question in this case—the right to give vindictive damages in a libel suit where actual

malice is found by the jury—receives great importance from the opinions of some judges of the Court of Appeals, which question that right. The doubt thus thrown upon a rule which I have received from my professional teachers as unquestioned, irreversible law, has made me feel it a duty to add something to the reasoning and authorities upon which the opinion of my brother is founded. The twenty-ninth exception taken by the defendant's counsel upon the trial, involves the point in controversy.

The judge was requested to charge as follows:—"That if the jury should find any ground for giving damages to the plaintiff, their verdict should be for such sum only as would compensate him for the injury he had sustained therefrom; and that the jury were *not* at liberty to give him any further sum by way of punishment of the defendant, or by way of vindictive damages, or as smart money."

The observations of my brother Bosworth, in contrasting this request with the charge actually made, and his conclusion that the refusal is not, when the whole is considered, ground of exception, appear to me unanswerable. But I am desirous of expressing my own opinion upon this great point, when placed in the strongest form in which it can be presented for the defendant. I shall, therefore, consider it as if the judge had expressly charged the converse of the proposition to be the law, and had employed the language of the request, varying it only by omitting the word "*not*" in the latter part, and inserting the same word after the word "*should*" in the first clause. In determining whether this would be ground of exception, the court is justified in connecting it with portions of the charge actually made, pertinent to the same question. It may, therefore, be viewed in conjunction with the instruction, "that an actual malicious intent in making the publication might be proven, and the jury was to judge by the evidence whether such an intent was made out. If such was the case, and the defendant had not proven his allegations to be true, he should not escape with nominal damages."

I shall treat the question, then, as the counsel insists it must be treated, under the refusal and the actual charge; and shall suppose that the judge had added, after what I have quoted

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from the charge, the converse of the proposition contained in the request, as I have stated it.

It is to be noticed that this proposition does not involve, but may be entirely consistent with, the exclusion of the idea of punishment for the injury done to society. It is punishment of the defendant for the wrong done to the plaintiff. It is punishment for an injury attempted or designed as well as for one inflicted. It is punishment for the intent to injure in numerous cases, where no injury can probably arise; and it is consistent with the assumption that the offence cannot be penally visited by the State; or if it can be, that the penalty is inflicted on a different ground.

I am unable to see any logical contradiction in holding, that the same person may be compelled to atone for the same offence to an individual for a wrong done or menaced him, and to society for his aggression upon her peace; nor again, that the mode of making such atonement should be payment of money in each case. If this is so, then the adjustment of the proportion of punishment becomes a matter of practical arrangement; and it will be seen that tribunals of justice have so adjusted it.

In this connection I may advert to the point taken by the counsel, that this doctrine of punishment invades the provision of the present constitution, that no person shall be subject to be twice put in jeopardy for the same offence. That precept is found in the early ages of the common law in the maxim, *nemo debet bis puniri pro uno delicto*, and was applicable to criminal prosecutions, and when one judgment or sentence had been perfected. Another maxim, perhaps more pertinent, is, that no one should be twice vexed, if it appears to the court, that it is for one and the same cause. (Shawe's Case, 5 Rep., 61).

It has never been imagined that either of these precepts interposed an objection to the institution of proceedings by the State simultaneously with an action by an individual for a libel. It has become settled law in England and in this State, that the existence or determination of the one is no bar to the other, although it may bear upon the question of the suspension of proceedings, and mitigation of punishment, in the

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criminal court. That court will postpone sentence or the proceedings, until the result of the civil suit is known, with a view to the extent of punishment; but the civil action is not stayed or affected by the criminal prosecution. (*Cook v. Ellis*, 6 *Hill*, 466, and cases). I am informed by two gentlemen, who have each filled the office of district attorney, that the practice is as frequent to stay proceedings before as after conviction, until the result of the civil suit is ascertained.

The punishment upon conviction for a libel in our State, is a fine not exceeding \$250, or imprisonment not exceeding one year, or both such fine and imprisonment. (2 *R. S.*, 697). This is the reparation to the public, which the legislature has deemed sufficient for the vindication of public justice. And that offence which is thus punished, is the tendency of the libel to provoke to a breach of the peace. (1 *Haw. Pl. C.*, 73; 2 *Kent*, 17).

This tendency is so essentially the ground of the criminal prosecution, that it lay at the root of the rule so long prevalent in our own country, that the truth upon an indictment for a libel could not be given in evidence. (*The People v. Crosswell*, 2 *John. Cas.*, 392; 2 *Kent*, 18). Whether true or false, the danger to the peace of the country was the same.

When, then, the terms vindictive damages, or exemplary damages, are employed in a civil action for libel, they mean, in my opinion, the atonement which the law demands shall be made to the libeled party by the offender, and such atonement involves essentially his punishment. It is a condemnation and infliction for traducing the individual—not for provoking him to break the peace.

It would be objectionable in this view of the case, to instruct a jury to give damages on the ground that the interests of society required the defendant's punishment, or that they could consider the offence to the State as a reason for increasing the damages. It must be admitted that this idea has, in some cases, been loosely and partially presented. It does not belong to that idea of the punishment now sought to be developed. That is consistent with the supposition, either that there is no penalty on behalf of the State, or that such penalty is for another cause, and with a different object.

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The moment we admit of any exception to the naked rule of compensation, measured by an accurate or approximate computation of actual pecuniary loss, we admit the idea of a reparation for something indefinite, and the adjustment of which must be indefinite.

It is stated\* that the Lord Commissioner (Adam) of Scotland—the most earnest advocate of the most restricted rule—said, in an action for defamation of a professional man, “that the question of damages must always include both a question of loss and *solatium*.” (Quoted by Mr. Sedgwick, 465, *N*). The allowance of any sum for *solatium*, is an allowance for something beyond positive loss, and for reparation distinct from restoration. It seems difficult to separate this idea of reparation from that of punishment. What is taken from the offender beyond what is lost and can be restored to the party injured, partakes of the nature of a penalty.

But again, there is a class of libel cases in which the character and situation of the person assailed, preclude the possibility, not merely of a pecuniary loss, but of an injury to his reputation, or even a wound to feeling. Lord Tenterden adverts to such instances when he speaks of the calumnies of those whose censure is more to be desired than their praise; and Cicero had before declared: *Invidiam virtute paratam, gloriam, non invidiam, putarem*. (*In Cat.*)

When the justice of the country is invoked to deal with a libeler in such a case, on what ground can any damage be awarded but upon that of atonement for an attempted offence, and punishment, as the absolute foundation and object of the verdict? Civil actions for libels must be abandoned, and in cases where the just indignation of an honest community demands their enforcement, if such a principle must be surrendered.

With these views, I have examined the leading English cases, and those of our sister States, which are cited by Mr. Sedgwick in his able work upon damages, and in the comments of Mr. Greenleaf and Mr. Metcalf upon them. A few others may be added. (*Cole v. Tucker*, 6 *Texas Rep.*, 268; *Fleet v. Hollerheep*, 13 *B. Monroe*, 225; *Stout v. Prad*, *Coxe's N. J. Rep.*, 79; *Trabue v. Mays*, 3 *Dana*, 138). It appears

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to me, that the great body of these authorities sanction the rule as I have attempted to express it.

It is superfluous for me to notice the decisions in our own State, after the critical and ample examination of them by my associate. I content myself with adverting to that of *Tillotson v. Cheetham*, in 1808, (3 *Johns. R.* 56), and to those of *Collins v. The Albany R. R. Company*, in 1852, (12 *Barbour*, 495), and *Taylor v. Church*, in 1853. (*Selden's Notes of Appeal Cases*, July 1853, 50).

In 1808, Chief Justice Spencer stated, "that it had always been the practice to instruct the jury in vindictive actions, such as libels, that they are to inflict damages for example's sake, and by way of punishment to the defendant." The rule thus declared to have always prevailed before 1808, has prevailed ever since, and has been recognized, or assumed to exist, in a long series of decisions in our State. It has become consecrated as an enduring maxim of our laws, by a perpetual tribute to its legal truth, offered by the illustrious judges of our tribunals, from the day of Spencer and of Kent to the charge of the chief justice of this court in the present cause. For myself, I feel that in wandering from it, I should merit the admonition involved in the maxim of Lord Coke: *Quod novum judicium non dat jus novum, sed declarat antiquum*.

For these reasons I consider the refusal of the judge to charge the jury as he was requested in the 29th exception, to be unobjectionable, and his actual charge correct.

A new trial must, however, be granted, on account of the admission of the deposition of Strakosch.

II. *March*.—Order to show cause why plaintiff should not be at liberty to introduce proof that Strakosch was in fact absent from the city at the time of the trial.

The plaintiff moved upon affidavits showing that at the time of the trial Strakosch was actually absent from the State,—he having left, the day after his deposition was taken,—that he might be allowed to prove the fact of the witness' absence either at the bar of the court or before a referee to be appointed; and that on that fact being satisfactorily proved,

the order granting a new trial, might be vacated, a re-argument ordered, and that the case or bill of exceptions might be so amended as to make it appear thereby that the absence of Strakosch was satisfactorily proved.

*A. L. Jordan* and *F. A. Sherman*, for the motion. The proof of the absence of Strakosch from the State, is now, and was at the trial, addressed solely to the court and not to the jury, and therefore could not affect the verdict. The proof showing both now and at the trial, that Strakosch was out of the State, and the proof at the trial slight as it was, being satisfactory to the judge before the deposition was read to the jury, if it is now satisfactory to the court, the order granting a new trial should be vacated. (*Roche v. Wood*, 7 *How. Pr. R.*, 416, *Morgan v. Avery*, 7 *Barb.*, 656). And the court may after granting a new trial, even on an *ex parte* application, order a re-argument and allow amendments in substance, and then reverse their own judgment. (*Slocum v. Fairchild*, 1 *Hill*, 294). Under the Code a new trial ought not to be granted, on the ground that the absence of Strakosch was not satisfactorily proved at the trial, if it is satisfactorily proved now. (§ 176, 467, 173, 174 and 271, subd. 2).

*D. D. Field*, *J. Townsend* and *B. Galbraith*, opposed.

First.—The motion is entirely unprecedented.

Second.—It supposes, first, that if it had been made at the argument on the appeal, it would at the last term have been successful; and second, that though not made then, the court will hear it now.

Third.—The court will not re-open the case for the purpose of letting in this motion:—

1. Is it clear that the court has the power to order a re-hearing of the appeal? For this is in effect an attempt to obtain a re-hearing. The Code declares (§38), when an appeal shall be re-heard. Does not that by implication exclude a re-hearing for any other cause?

2. But supposing it to have the power, yet the restraints it imposes on itself will not allow it to re-hear this case. Its own dignity, and the respect which it requires, and the orderly con-

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Fry *a. Bennett*.

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duct of its proceedings, forbid it. The parties have had their day in court. If re-hearings are allowed in one case, they will be asked in all. The constitution of the court makes it particularly inconvenient, only three judges generally sitting at the general term, (4 *McLean*, 254 ; 4 *Wend.*, 188 ; 25 *Wend.*, 253) ; and if re-hearings are allowed, they will always be attempted when the six judges are on the bench.

3. The courts have always leaned against re-hearings. There is a sort of tradition on the bench that they are injurious, and to be discouraged.

4. There were other points in the case argued at the general term, on which no opinion was expressed.

5. The plaintiff has acquiesced in the decision, and under it noticed the case for trial at the present term. It is submitted, therefore, that the court will not grant this application, for these reasons, if there were no others, that the case has been once fully heard, carefully considered, the order for a new trial entered, and the cause noticed for trial.

Fourth.—If, however, the decision of the general term were to be re-opened, the application to examine witnesses, to supply the defect of proof at the trial, should not be granted:—

1. The jurisdiction of the general term is purely appellate, and that implies that it shall decide the case upon the same grounds as the special term. (*Code*, § 37.)

2. The deposition of a witness taken conditionally can only be read “after it has been proved that he is absent.” The proof of absence cannot be made or supplied after the deposition is given in evidence. (2 *R. S.*, 392, § 7.)

3. The cause was heard at the last term upon exceptions, as well as upon a case. An exception cannot be obviated by proof at the argument of the appeal.

4. The instances in which proof has been heretofore permitted to supply omission at the trial are those in which the proof was documentary and could not be contradicted, and the motion was addressed to the discretion of the Court. (3 *Johns. Cas.*, 125 ; 13 *Wend.*, 525 ; 2 *Sandf.*, *S. C.*, 719.)

Fifth.—The Code gives no countenance whatever to this motion ; it is not a case of “amendment.” If it were otherwise one might always supply defective proof on an appeal ;



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and proof might as well be introduced on one side as the other, to reject a deposition, as to admit it. The word "proceeding," in the view of the Court of Appeals, does not include an affidavit. (1 *Comst.*, 611). "To supply an omission in any proceeding," in section 174, refers to an omission in a record or paper—otherwise one might supply an omission to appeal or to give evidence. (Sec. §§ 174, 327; 7 *P. R.*, 108, 8 *P. R.*, 301).

Sixth.—If, however, the case were one in which all the obstacles before mentioned were removed, and the court would re-open the case and the omission might be supplied by proofs at the bar, yet it would be a matter resting in the discretion of the court, and governed by considerations affecting the furtherance of justice. In this case justice would not be promoted by the admission.

OAKLEY, C. J., (orally). On last Saturday a motion was made and argued in the case of Fry against Bennett. Fry, as is well known, sued Bennett for a series of libels on his character and conduct as the manager of an opera. Trial was had of that suit, and it resulted in a verdict against defendant. In the course of that trial, the deposition of one Strakosch was offered in evidence. He had been examined by virtue of an order made for that purpose. His deposition was offered to be read, and it was received, under the general objection on the part of defendant's counsel that the absence of the party was not satisfactorily proved. On the argument of the case an exception was taken to the ruling of the judge at the trial admitting that deposition, and a bill of exceptions on all the evidence in the matter was brought before the court and argued. The court ordered a new trial solely on the ground of the improper admission of that deposition. Various other questions of importance and magnitude were involved in the case, in respect to some of which the judges who decided the case expressed an opinion; but, as I understand it, the reversal of the judgment and the ordering of a new trial rested on no other ground than that just referred to. After this argument, and after the decision of the case, an order for a new trial was entered. The plaintiff now proposes to produce testimony at

the bar of the court, in order to remedy the defect in the evidence which existed at the trial, in relation to the absence of Mr. Strakosch. He proposes to produce witnesses and have them examined, and he has presented the affidavits of these witnesses, going to establish very clearly that this man was, in fact, absent at the time of the trial; and which evidence, if it had been produced on the trial, would appear sufficient to have authorized the introduction of the deposition.

In the discussion which took place last Saturday on this matter, counsel for plaintiff was admitted—perhaps a little irregularly—to enter into an argument as to the correctness of the decision of the court in admitting this deposition. The court heard him, as much perhaps out of deference to counsel as from any other reason. He also entered into a similar discussion, intending to show that the judges who heard the case on the bill of exceptions had come to a resolution which was contrary to law. In disposing of this matter now, I take occasion to say that the judges who made that decision, and ordered a new trial, and to whom these suggestions were made, see no reason to alter the views which they then entertained in relation to this matter. The question which counsel, in his argument, presented, did not naturally or positively connect itself with the motion before the court. Still, however, as the counsel entered into an argument on the subject, it is proper to say here, that the judges who so decided have not in those suggestions discovered any reason to doubt the correctness of the conclusion at which they arrived in that case.

Now, in respect to the points on which this motion turns, we have examined the matter, and we cannot see any just ground on which we can grant this motion. It has, no doubt, often happened—I know it myself in my own experience, and I know it as a matter of common expediency—that when, on the trial of the case, there has been some omission of evidence, which afterwards, on an examination of the case at bar, is discovered to be material, it is within the discretion of the court to permit such evidence to be supplied. It is done, for instance, in the case of a judgment record, or of a deed, or of any documents as to which there can be no dispute, and which can lead to no conflict of testimony. Courts have occasionally, when

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such matters have come before them, sent a case back for a new trial ; but that is seldom done when the purpose is merely to introduce a document which could, in no possible way, have influence upon the minds of the jury. The attempt now is to carry this practice further. It is attempted to have an application of this kind made to the court after judgment in the case. After the case is decided, and a new trial ordered, it is attempted to introduce evidence on a point which might be the subject of conflicting testimony. Thus, witnesses whom the plaintiff's counsel proposes to produce before the court and examine, might, for all we know, be contradicted, and successfully contradicted, by others. At all events, the admission of such evidence would open the door for a trial on matters of fact which were not sufficiently proved at the trial ; and this would be clearly inconvenient, and not only that, but highly improper. We are quite of opinion, therefore, that we cannot extend the practice on this subject beyond the cases in which it has been hitherto adopted ; that is, beyond cases in which, when a bill of exceptions is brought before the court, application is made to supply a defect in the evidence—formal merely—and which evidence, when produced, verifies itself, and is necessary, as a matter of record, to sustain the party who obtained the verdict. This is allowed to be done when it is unnecessary and inexpedient to put the parties to the expense of a new trial, and where the proposed supplementary evidence is merely a paper which cannot be disputed. In this practice there is nothing unsafe or inconvenient ; but it is easy to see that if we were to go further, and undertake to enter into inquiries in relation to evidence which in its very nature is controvertible, where opposite witnesses might be called, and where it would be for the court to weigh the credit of the witnesses, such a practice would lead to great irregularity. On that ground, therefore, it is quite clear that this motion cannot be granted. It is quite clear, also, that such a motion never has been granted after judgment being given. The application is, in fact, to open a judgment which has been entered, to set aside the order for a new trial, to allow additional facts to be proved, and to bring the matter up *de novo*. In the judgment of the court, that would be the effect of granting this motion.

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Now, it is much better that the parties be put to the inconvenience of a new trial, in which this defective proof in regard to Strakosch's deposition may be remedied. On the whole, therefore, the motion must be denied. The reasons for this decision are given more extensively in detail in the written opinion, which can be resorted to by parties interested in it.

By THE COURT, BOSWORTH, J.—We have no doubt that the deposition of Strakosch was improperly admitted as evidence, and that a new trial should have been granted for that cause. It is now contended by the plaintiff, that, conceding this to be so, yet as the evidence on which its admissibility depends is, by statute, to be addressed to the court only, and is not to be, and is not considered by the jury in forming their verdict, and as it is now made apparent, by satisfactory proof, or can be made so, that Strakosch was continuously absent from the State until after the trial, the court should now allow the fact to be proved; and that if conclusive proof is given, the order granting a new trial should be vacated, and a re-argument ordered, and the case be so amended as to present on its face satisfactory proof of the fact of such absence.

The plaintiff relies mainly on that class of cases in which a party who has obtained a verdict on defective or insufficient proof of some fact, the existence of which depended on record or documentary evidence, has been allowed to supply the defect, *on the argument* of a motion for a new trial, by producing a properly exemplified copy of the record or document. He cited 2 *Sand.*, *S. C. R.*, 719; 3 *Barb.*, 429; 24 *Wend.*; 14 *Wend.*, 126; 4 *Wend.*, 591; 13 *J. R.*, 517; 3 *J. C.*, 125; 2 *Metcalf*, 64.

All of those cases, except two, (3 *Barb.*, 420, and 24 *Wend.*, 14), came before the Court on a case made, and not on a bill of exceptions, or upon a writ of error. In all of them the defect was supplied *on the argument*, and before a decision was made by the Court *in banc*. And in all of them the point defectively proved at the trial was capable of being proved by record evidence, which could not have been controverted had it been produced at the proper time, and evidence of the latter kind was produced and received *on the argument* in opposition

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the motion for a new trial. It has been expressly decided that that rule does not apply to a *bill of exceptions*. In *Hart v. Coltrain*, (24 *Wend.* 14), the Court stated the rule in these terms:—

“A motion for a new trial, on a *case* made, is addressed to the sound discretion of the Court; and where the party relies on some defect in the proofs, which is afterwards supplied by evidence which could not have been controverted had it been produced at the proper time, and the Court see that a new trial could be of no use, the motion would be denied.—(*Burt v. Place*, 4, *Wend.* 597, and cases cited). But this rule does not apply to a bill of exceptions, and we cannot look into the affidavit.”

In that case an exemplification of an affidavit made by an administrator before a Judge of the Court of Probate was produced at the argument, which, it was claimed, was sufficient to confer jurisdiction to make an order, the validity of which was questioned at the trial, on the ground that it was not then shown that jurisdiction to make it had been acquired. But as the cause was before the court on a bill of exceptions, and not on a case, the court refused to look at the exemplified copy, and ordered a new trial.

In *Dresser v. Brooks*, (3 *Barb.* 429), this distinction does not appear to have been adverted to, and no reference is made to *Hart v. Coltrain*. The only decisions cited are, 14 *Wend.*, 126, 13 *ib.*, 524, and 5 *ib.*, 535. In these causes the defeated party moved for a new trial on a case.

It may perhaps be said of *Dresser v. Brooks*, that although the report of it shows that exceptions were taken at the trial, yet it does not state that that case came before the court on a bill of exceptions. If before the court on a case, which reserved no right that it should be turned into a bill of exceptions, the decision made in it does not conflict with that made in *Hart v. Coltrain*. We have been referred to no case in which a re-argument was ordered to allow such proof to be given after the verdict had been set aside and a new trial granted. Nor have we been referred to any case in which defective proof was allowed to be supplied on the argument of a motion for a new trial, even when such proof was to be

considered by the court only, if the fact to be proved was to be established by the *viva voce* testimony of witnesses, or by any evidence which in its nature was controvertible.

To allow such a motion, would assume that it was competent and not inexpedient for the court, after reversing a judgment upon an exception taken at the trial, and after both parties had been heard upon it, at the general term, to vacate the judgment of reversal, and allow defective evidence to be supplied by proofs, to be given at the general term, provided the proofs related to a point upon which evidence was to be given to the court only, and then rehear the appeal, and dispose of it as if such proof had been produced at the trial.

The statute requires "satisfactory proof" to be given at the trial; and unless it is there given, the party taking such a deposition, has no right to read it at all.\* To grant this application, would be equivalent to holding that, although there was, confessedly, no evidence given at the trial of the absence of the witness from the State, yet the Court, on appeal, and on reviewing an *exception* taken to such an admission of a deposition, might, without any impropriety, allow witnesses to be examined at the general term, to prove that in point of fact, the person who had been examined *de bene esse* had continued absent from the State, so that his attendance could not be compelled by the ordinary process of law. Whether an appeal at the general term is from an order denying a motion made for a new trial on a case, or from a decision of questions of law upon a bill of exceptions, we are of opinion that it would be improper, and highly inexpedient, to so extend and apply the rule as it would be necessary to do, to sustain this motion.

The motion is therefore denied, with costs.

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Hilton a. Thurston.

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## HILTON a. THURSTON.

*New York Common Pleas ; Special Term, February, 1855.*

## VACATING JUDGMENT.—NON SERVICE OF SUMMONS.

The Court will not set aside a judgment for non-service of summons when it appears that although the defendant had notice of an attempt to effect service upon him, he delayed to move, until supplementary proceedings were instituted.\*

## Motion to set aside judgment for irregularity.

The judgment in this case was entered upon a failure to answer ; the usual affidavit of service of the summons and complaint being filed. The defendant now denied the fact of service, by his own affidavit, and also produced the affidavit of one Plumbager, his book-keeper, who stated that some time in November he was served with a summons intended for Thurston. He told the young man making the service, that he was not Thurston. "Well," said the messenger, "you may give the papers to him ;" and he left them upon a chair, near-by.

DALY, J.—(Orally).—The judgment is not irregular. It was entered upon a regular affidavit of the service of the summons and complaint.

The defendant's affidavit now states that the person serving the summons and complaint, left them with the defendant's foreman, Plumbager. If the facts were as stated by the defendant, he knew that an attempt had been made to commence the suit by leaving the papers at his place of business, with his bookkeeper. From the admission made by him, it appears that he consulted his attorney, and learning that the service was insufficient, he concluded to let the plaintiff go on. He denies that he knew anything of the judgment, but carefully avoids denying that he knew of the service of the papers on his foreman, or that the papers, after that service, came into his possession. He knowingly suffered the plaintiff to go on, to enter up judgment,

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\* See also Southwell a. Marryatt, *Ante* 218.

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 Broderick *a.* Boyle.
 

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issue execution, and after its return, to institute supplementary proceedings, and he now comes into court and moves that all the proceedings be set aside, with costs.

Such a course the court will not countenance. It has long been the established practice of the court that a party must make his application at the earliest practicable opportunity after the irregularity of which he complains has taken place, and not knowingly suffer further proceedings to be taken.

If there is any defence, the defendant will be allowed to come in and defend without terms; but as the fact of the personal service of the summons and complaint upon the defendant is positively sworn to by the affidavit on file, upon which the judgment was entered up, it will not be set aside upon such a case as the defendant discloses.

See *Downes v. Witherington*, (2 *Taunt.* 243).

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 BRODERICK *a.* BOYLE.

*New York Common Pleas; Special Term, February, 1855.*

MECHANICS' LIEN.—REQUISITES OF COMPLAINT.

The complaint of a sub-contractor who seeks to enforce a mechanic's lien for labor or materials, should show that his own contract with the contractor was made in conformity with the terms of the contractor's contract with the owner.\*

Where it fails to show this, plaintiff will be required on motion, to make his complaint more definite and certain in this respect.

Motion that plaintiff make his complaint more definite and certain.

The complaint in this action was filed to enforce a lien for materials furnished. The complaint stated that the materials were furnished by plaintiff in pursuance of a contract made by him with a contractor with the owner; but it did not state whether or not that contract was in conformity with the contract between the contractor and the owner.

DALY, J.—(Orally).—The law gives a lien in two cases:—  
1, where a contract is made with the owner. 2, where a

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\* See also *Quin a. Mc Oliff*, *post* 322.



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Whitlock's Case.

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contract is made with the contractor with the owner, commonly called the first contractor, *and is in conformity with the contract made with the owner.* The first contractor might put up a different building or structure than that provided for by the contract, and the party who performed work or furnished materials towards the erection of such a structure, would have no lien against the owner of the land. A lien against the owner exists only when the work performed or the materials furnished by the sub-contractor is contemplated by the contract between the owner and the first contractor. In the language of the statute, the sub-contractor's contract with the first contractor must be in conformity with the original contract made by the owner.

The complaint must be amended. In its present form it does not set forth a sufficient cause of action.

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WHITLOCK'S CASE.

*New York Common Pleas ; In Chambers, February, 1855.*

EXAMINATION OF JUDGMENT DEBTOR.—REQUISITES OF AFFIDAVIT.

When it will be presumed that a judgment was for twenty-five dollars, exclusive of costs.

Order for the examination of a judgment debtor.

The affidavit on which the order had been obtained, stated, that a judgment was recovered against the judgment debtor sought to be examined, in the First District Court of the city of New York, for \$33 12; and that another judgment was recovered against him by the same plaintiff, in the Marine Court, for \$511 56. It did not state in terms that these judgments were for twenty-five dollars, exclusive of costs.

*S. Jones*, for the judgment debtor, objected that the affidavit was insufficient to support an order for examination, inasmuch as it did not show that the judgments were for \$25, exclusive of costs.

*B. V. Abbott*, contended that this was sufficiently shown.

DALY, J.—(Orally).—In the Marine Court, by the act of 1852, the plaintiff can recover no costs, unless he recover fifty dollars. The amount of the judgment as stated in the affidavit, is five hundred and eleven dollars. It *must* be for twenty-five dollars, exclusive of costs, because the plaintiff could have recovered no costs unless he recovered at least fifty dollars. The allegation that that judgment is for twenty-five dollars, exclusive of costs, was therefore unnecessary in the affidavit.

In the District Court, the costs are limited to five dollars. Here the amount of the judgment is stated to be thirty-three dollars and upwards, so that it *must* have been for twenty-five dollars, exclusive of costs.

The examination proceeded.

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FOSTER a. POILLON.

*New York Common Pleas ; Special Term, February, 1855.*

MECHANICS' LIEN.—REQUISITES OF COMPLAINT.

A complaint filed to enforce a mechanic's lien, should show that such is its object.

Motion to set aside a complaint for irregularity.

In this case papers were served for the foreclosure of a mechanic's lien ; but the complaint filed, contained nothing about any claim for a lien. It merely set forth in the usual form the indebtedness of defendant for work, labor and materials furnished. The defendant moved to set it aside.

*Bellows*, for the motion. As the complaint is regular upon its face, we could not demur. We therefore move to set it aside. The notice is equivalent to a summons, and according to the former practice, if the complaint did not agree with the summons, it would be set aside. Here the summons or notice is for the foreclosure of a lien ; but the complaint says nothing about any lien.

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Quin *a.* Mc Oliff.

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*Waite*, opposed. We are not bound to state in our complaint that proceedings have been instituted to enforce a lien. We file our complaint to recover for work and labor generally.

DALY, J.—You are required to show that you have a claim against the owner. If you made no contract with him, it must appear that you made a contract with the person who contracted with him to erect the building, and that that contract was in conformity with the contract with the owner, or you have no lien and no cause of action against the owner.

*Waite*.—We made our contract directly with the owner.

DALY, J.—(Orally).—Issue is to be joined in the language of the statute, *upon the claim made*—that is, the claim made in the notice to appear and submit to the accounting. The plaintiff claims, by virtue of his contract, to enforce a lien upon the building, and the peculiar nature of that claim should appear by the complaint. This is essential to the judgment which he seeks, or rather to the right claimed by him, to enforce his lien by execution against the specific building.

Plaintiff had liberty to amend.

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QUIN *a.* McOLIFF.

*New York Common Pleas ; Special Term, February, 1855.*

MECHANICS' LIEN.—REQUISITES OF COMPLAINT.

The complaint of a sub-contractor who seeks to enforce a mechanic's lien for labor or materials, should show that his own contract with the contractor was made in conformity with the terms of the contractor's contract with the owner.

Motion for an injunction.

This was an action brought against McOliff, and the corporation of the city of New York. Its object was to foreclose a mechanic's lien, claimed by the plaintiff, upon a building owned by the corporation. The plaintiff had done work upon

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Quin v. McOloff.

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the building in pursuance with a contract between himself and McOloff, who had contracted with the corporation.

The corporation appeared in the action; but the defendant, McOloff, made default.

The plaintiff apprehending that the defendants were about to tear down the building to which his lien attached, moved for an injunction to restrain them from so doing, on the ground that to tear it down, would be doing an act tending to render his judgment ineffectual.

The defendant, McOloff, appeared by counsel to oppose the granting of the injunction.

*Belows*, for defendant, McOloff. The order to show cause why an injunction should not be granted, was served upon McOloff. He, as well as the corporation, is sought to be restrained, and he is entitled to appear at this stage of the proceedings to oppose the application.

The plaintiff is not entitled to an injunction, unless it appears by his complaint that he is entitled to the relief demanded. (*Code*, § 219). His complaint shows no cause of action. It merely states that he performed work and furnished materials in pursuance of a contract with McOloff. This is not enough to give him a lien.

DALY, J.—(Orally). The corporation being the owner and Oliff the contractor, it ought to appear by the complaint that the work was performed and the materials were furnished by the plaintiff to McOloff, *in conformity with the terms of the contract made by McOloff, with the owner*, the corporation. This was essential to the right of lien. The complaint contains no such averment, nor does that fact appear even by the notice filed with the county clerk. No right of action was shown by the complaint, and no injunction can be granted.

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James a. Oakley.

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## JAMES a. OAKLEY.

*New York Superior Court, Special Term; March, 1855.*

## MORTGAGE SECURITY.—USURY.

A mortgagor of chattels cannot, after sale of the chattels to a third party, sustain an action to cancel the mortgage and notes secured by it, and to enjoin proceedings to enforce it, on the ground of usury in the loan for which it was given.

*It seems*, that the purchaser of property subject to a mortgage, cannot avoid the mortgage on the ground of usury.

Application for an injunction to restrain the foreclosure of a chattel mortgage, and sale of the property, on the ground of usury in the loan.

*S. Sanzay*, for plaintiff.

*J. S. Jenness*, for defendant.

HOFFMAN, J.—The plaintiff on the 7th day of October, 1854, borrowed of the defendant the sum of \$2000, to be repaid in equal amounts, in six monthly payments; for which he gave six promissory notes, for \$333 33 each; and, as security, executed a chattel mortgage upon thirty sewing machines, described in the complaint. The loan is alleged to have been usurious by an exaction and taking of ten cents a day upon every hundred dollars of the amount; and that for three months the usury was actually paid. The defendant threatens to take possession of the property, and to apply it in satisfaction of his demand. The prayer is, that the notes and mortgage be cancelled, and an injunction issue, restraining the defendant from any proceedings to enforce the security.

The defendant has taken possession and advertised the property for sale.

The case made by the affidavits of the defendant in opposition to the motion, is this: that the plaintiff, the mortgagor, had sold, in January last, all the property covered by the mortgage, to one Alfred Hyde; that Hyde had agreed to assume and pay the mortgage, and had several times informed

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Taylor a. Monnot.

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the defendant that he would pay it, and was about to pay it off.

The allegation is sustained by several affidavits, besides the defendant's shewing declarations of Hyde, that he had made the purchase, and declarations of the plaintiff, that he had sold to Hyde. Oakley, it is to be observed, does not deny the usury. His statement in the last clause of his affidavit cannot be treated as such a denial.

One of the deponents (L. W. Somerindyke,) swears, that he was shown by Hyde what purported to be a bill of sale from James, the plaintiff, to him, of the property in question.

These affidavits show in the first instance, at any rate, that the plaintiff has no longer any right or title in the property, which will enable him to sustain an action concerning it. There is no affidavit of Hyde produced or offered tending to disprove these facts; but Alfred Hyde is one of the plaintiff's sureties in the undertaking.

It may be, that this is a scheme to cancel the mortgage for his benefit, when, as purchaser, he himself could not avoid it, on the ground of usury. (*Post v. the Bank of Utica*, 7 *Hill*, 293. *Wells v. Gibson*, 4 *Sand. Ch. Rep.*, 337). But without entering upon that question, it is sufficient to say, that the plaintiff appears not to have at present any right or interest in the property.

The motion for the injunction must be denied, with ten dollars costs, and the order for the temporary injunction, made the 23d day of February last, be vacated.

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TAYLOR a. MONNOT.

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*New York Superior Court; General Term, December, 1854.*

INNKEEPER'S LIABILITY.—EVIDENCE.—TESTIMONY OF PLAINTIFF.

The case of *Wintermute v. Clark*, (5 *Sandf. S. C. R.* 242), approved.

*It seems*, that the liability of an innkeeper for the baggage of his guest, is not confined to personal baggage, but extends to all the property, which as the property of his guest, the innkeeper consents to receive.\*

The guest is a competent witness in an action between himself and the innkeeper, to prove the character and value of the property lost, so far as it is personal baggage; but so far only.

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\* Compare *Needles v. Howard*, (1 *Smith's C. P. R.* 54).

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Taylor v. Monnot.

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Money in a trunk, not exceeding the amount reasonably required by the traveller to defray the expenses of the journey which he has undertaken, is a part of his baggage ;\* and in case of its loss, the plaintiff may prove its amount by his own testimony.

Verdict for plaintiff, subject to the opinion of the general term.

This action was brought to recover money stolen from the plaintiff's portmanteau, while he was staying as a guest at the New York Hotel, kept by the defendant.

The answer denied that the house kept by the defendant, was a common inn, averring that it was a boarding house. It also denied the loss alleged by plaintiff, and averred that if lost at all, the money was lost by the plaintiff's own negligence.

Upon the trial the plaintiff proved by the testimony of travelling companions, that on the 10th January, 1853, he put up at the defendant's hotel; that on the 11th, he locked the door of his room and went to dinner, and on his return, he found the door unlocked, the lock of his portmanteau broken open, its contents scattered about the room; and also by the same testimony, that he had been accustomed to keep his money, which was mostly in gold, in his portmanteau. The testimony of the plaintiff was then offered, to show the contents of his portmanteau. It was objected to as incompetent, but admitted, and exception taken. It showed that among other articles in his portmanteau, was his purse, containing \$353 24, which was stolen.

The defendant then offered to prove by the testimony of hotel keepers and others, that a portmanteau was an unsafe place in which to deposit money, at a hotel. The plaintiff objected, and the court excluded the evidence.

The jury, under direction of the court, found a verdict for the plaintiff for \$384 80, the amount claimed, with interest, subject to the opinion of the court, on a special case, to be first heard at the general term.

*J. W. Edmonds*, for plaintiff.

*E. Logan*, for defendant.

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\* But see *Grant v. Newton*, (1 *Smith's C. P. R.* 95). It was held in *Duffy v. Thompson*, decided in the New York Common Pleas, General Term, March, 1855, but not yet reported, that money carried in the trunk of a traveller while on a voyage to a foreign country, is a part of his baggage; such a case not coming within the principle of *Grant v. Newton*.

DUER, J.—The question raised in the answer, and upon the trial, whether the hotel of the defendant is in judgment of law a common inn, was not pressed upon the argument before us, and so far as this court is concerned, must be regarded as settled by our decision, in *Wintermute v. Clark*, (5 *Sandf. S. C. R.*, p. 242). The cases in regard to this question are not distinguishable.

The liability of an innkeeper is by no means so restricted as that of a carrier of passengers. It is not confined to the personal baggage of the guest, but probably extends to all the property which, as belonging to the guest, the innkeeper consents to receive. Hence if in this case the plaintiff's loss and its amount had been proved by other witnesses than the plaintiff himself, not a reasonable doubt could have been stated as to his right of recovery. But if the testimony of the plaintiff must be rejected, it cannot be denied that the proof upon the trial was wholly insufficient to sustain the action. The case therefore turns entirely upon the question whether the plaintiff was properly admitted as a witness.

We are by no means prepared or disposed to say that in actions like the present, the plaintiff is a competent witness to prove the nature and extent of his loss, whatever may be the character or value of the property which it is alleged the loss involved. On the contrary, we are clearly of the opinion that his admissibility as a witness, rests upon the same ground, and is subject to the same limitation, as that of a passenger admitted to prove his own loss in an action against a carrier; and after a careful examination of the authorities, we think the law ought to be considered as settled, that in such cases, the passenger is, to some extent, a competent witness on his own behalf. He is so to prove the contents of a trunk lost or broken open, but only in respect to those articles which may be properly considered as a part of his personal baggage; that is, as intended for his personal use or accommodation. It is presumed that the contents of the trunk in respect to such articles, are known to the owner alone, and, consequently that were his testimony excluded, he would be without a remedy. He is admitted therefore as a witness to prevent a failure of justice—in other words, from a moral necessity. (12 *Viner*



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*Abr.* p. 32. *Bull. N. P.* 181. *Story on Bailm.*, § 454, (note). 1 *Greenleaf on Ev.*, § 348, p. 417, and note 2. *Sneider v. Geiss*, 1 *Yeates*, 34. *Herman v. Drinkwater*, 1 *Green. R.*, 27. *Clark v. Spence*, 10 *Watts*, 335. *Johnson v. Stone*, 11 *Humphrey*, 419). It is plain that the same necessity exists when the traveller is a temporary guest at an inn, and equally so, that it extends no further in the one case than in the other.

It is insisted, however, that money in a trunk, although not exceeding in amount the sum which the traveller in good faith has judged to be necessary to defray his personal expenses, cannot properly be regarded as forming a part of his "baggage," in the limited sense of the term, and consequently that in respect to money, the testimony of the traveller, whether a passenger or guest, cannot be received to prove the fact, or the amount of his loss. But we think that Mr. Justice Nelson in delivering the judgment of the court in the case of the Orange County Bank *v.* Brown, (9 *Wend.*, 119,) laid down the true rule, namely: that money intended to defray the personal expenses of the traveller, may be justly included in the term "baggage," and we adopt the opinion not only as reasonable in itself, but as best sustained by the authorities. In the case of *Coles v. Goodwin*, (19 *Wend.*, 251), the trunk, for the loss of which, and its contents, the defendants, as carriers, were held to be liable, contained a small sum of money, which the verdict of the jury embraced, but which, had it not been considered as forming a part of the baggage" of the plaintiff, ought to have been, and, we must presume, would have been deducted from the judgment. It may be said, that in this case, the question as to the liability of the defendants for the money, was not distinctly raised; but this exception cannot be taken to the case to which I shall next refer, in which the question whether money in a trunk, not more than sufficient for the traveller's expenses, may be considered as part of his *baggage*, was not only raised and argued, but, as we think, positively and affirmatively decided.

In this case, *Weed v. The Saratoga and Schenectady R. R. Co.* (19 *Wend.* 534), the verdict of the jury was rendered solely for a sum of money, (\$285), contained in a trunk, which the defendants, as carriers, had lost, and their counsel upon the

trial, contended that they were not liable upon the grounds that they had received no reward for carrying the money, and that no notice had been given to them that any money was contained in the trunk. The judge overruled the motion for a nonsuit, and charged the jury, that if they were satisfied that the trunk had been committed to the care of the defendants, and was lost by them, the plaintiffs were entitled to recover, unless they should be of opinion that the amount of money in the trunk was so large as to render the want of notice a fraud upon the carriers, or *that it was more than a reasonable and sufficient sum for travelling expenses*. The jury having found a verdict for the plaintiffs, the defendant's counsel upon the exceptions which they had taken to the charge of the judge, moved for a new trial.

In delivering the opinion of the court upon this motion, Cowen, J. said, that the question whether the money in the trunk "was more than sufficient for travelling expenses, and so *not a part of the baggage*, had been left to the jury *in a shape as favorable to the defendant as the law would require, and perhaps more so*;" and he referred in support of his opinion to the case of the Orange County Bank & Brown, thus adopting the rule there suggested by Nelson, J., as that by which the court meant to be governed. The motion for a new trial was, however, granted; but granted upon the sole ground, that there was no such privity of contract between the parties as could entitle the plaintiffs, in their own names, to maintain the action. Although the money belonged to them, it was contained in the trunk of their clerk, who was travelling as their collecting agent, and was reserved by him for the expenses of his journey. Had the action been brought, as it ought to have been, in the name of the clerk, it is certain that judgment would have been rendered in his favor. We see therefore no reason to doubt that the decision of the Court upon the question we are considering, is entitled to the same weight and authority as if the action had been properly brought, and a judgment for the plaintiff actually rendered.

We cannot think that these authorities are countervailed or at all shaken by the doubts expressed by Mr. Justice Bronson in the case of *Hawkins v. Hoffman*, (6 *Hill*, 598). The learned

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judge rested his doubts entirely upon the assertion that "men usually carry money to pay travelling expenses, about their persons, and not in their trunks and boxes;" but we have no knowledge, judicial or personal, of any such general usage as he supposes to exist. We are persuaded, on the contrary, that the usage varies according to the character of the journey, the sum necessary to be carried, and the personal habits of the traveller, and that in a large class of cases, including that now before us, the general usage, is directly opposite to that of which the existence is assumed. Foreign travellers in the United States, in order to save themselves from the embarrassments and losses they would otherwise incur from their ignorance of the local currency in the different States which they visit, usually take with them in specie the sums which they deem to be necessary for their personal expenses; and that it is safer, as well as more convenient, to carry a purse of gold or silver in a locked trunk, than about the person, we think will hardly be doubted. In the absence of proof to the contrary, we have no right to say that such is not the usage.

Since the case of *Hawkins v. Hoffman*, the exact question has arisen and been determined in the Supreme Court of Massachusetts, in the case of *Jordan v. The Fall River R. R. Co.*, (5 *Cushing*, 69). The learned Judge who delivered the opinion of the court, reviews and examines the cases I have cited, and expressing his dissent from the views of Mr. J. Bronson, arrives at the conclusion, "that money in a trunk taken *bona fide* for travelling expenses and personal use, may properly be regarded as a part of a traveller's baggage, for the loss of which the carrier is responsible," and consequently to prove the loss of which the traveller is himself a competent witness. The like decision has been made by the Supreme Court of Tennessee, in two cases—*Bomar v. Maxwell*, (9 *Humphrey R.*, 61), and *Johnson v. Stone*, (11 *Humph.*, 419). In the last case, the plaintiff was admitted as a witness to prove the loss.

In the case before us, it was sufficiently proved, and was not denied upon the trial, that the money lost by the plaintiff, was intended for his personal expenses, nor was it asserted that it exceeded a reasonable amount for that purpose. Hence these questions were not submitted to the jury, nor was there any

exception to the charge of the judge, upon the ground of the omission.

The only exceptions that were taken in addition to that which we have considered and overruled, were to the refusal of the judge to submit to the determination of the jury, the question of negligence on the part of the plaintiff, and to his rejection of the offer to prove by the opinions of hotel-keepers and others, that the locked portmanteau of the plaintiff was an unsafe place for the deposit of his money. We are all of opinion that neither of these exceptions was well taken. No facts were proved from which the jury could have been warranted to infer that the plaintiff was guilty of any negligence, which contributed to the loss, and upon such a question, the opinions of witnesses ignorant of the facts, were certainly not admissible as evidence.

The plaintiff is therefore entitled to judgment upon the verdict as rendered.

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SLACK v. HEATH.

*New York Common Pleas; General Term, March, 1855.*

PLEADING.—ACTION UPON UNDERTAKING.

Under the Code, the recitals of an instrument averred in a complaint to have been executed by the defendant, have the same effect as specific averments of the truth of the facts recited. *Woodruff, J. dissenting.*

It is improper to set up in an *answer* that the complaint does not contain facts sufficient to constitute a cause of action.

Where a statute prescribes the giving of an instrument, and its purport, it is consideration enough to support the instrument, that it was given pursuant to the statute, and has its sanction.

It is no objection to an undertaking given by the defendant for the return of specific personal property, which has been taken from him by requisition on the part of the plaintiff, that the undertaking purports to be given to the plaintiff, and not to the sheriff.

In an action against the sureties in such an undertaking, it is not necessary to aver the issuing of execution against the original defendant.

Appeal, upon a bill of exceptions.

This action was brought against John Heath and J. H. Col-

ton, upon an undertaking alleged to have been given by them under the following circumstances :

In 1850, Almy Slack, the plaintiff, commenced an action in the Supreme Court against Thomas Carnley, then sheriff of the city and county of New York, to recover certain specific personal property. She caused that property to be taken by the coroner; and Carnley being desirous that it should be returned to him, procured the undertaking now in suit to be given by the present defendants.

The plaintiff's complaint in the present action alleged that she commenced an action against Carnley, and that in the course of that action, the undertaking was given by the defendants; and the undertaking was set out in full. But it did not state what was the nature of the action, or what proceedings were had in it; except that these things were recited in the undertaking itself. After setting forth the undertaking, the complaint proceeded to state that the plaintiff recovered a judgment against Carnley, which was still unpaid; but whether she had ever endeavored to collect it by execution, or not, did not appear.

The answer denied the making of the undertaking, and also averred that the plaintiff had it in her power to collect the judgment against Carnley, by execution; and set up that the plaintiff had no cause of action against the defendants, until the return of the execution against Carnley unsatisfied.

Upon the trial before Daly, J., neither party introduced evidence; but the defendant moved for a nonsuit upon the pleadings, upon a number of grounds which amounted in substance to this: that the complaint did not state facts sufficient to constitute a cause of action. The court denied the motion, and instructed the jury to find for the plaintiff. Judgment having been entered upon their verdict, the defendants appealed to the general term.

The substance of the pleadings, and the principal objections to the complaint taken by the defendant, are fully stated in the opinions, particularly the opinion of Woodruff, J. The question most considered upon the appeal was, whether the circumstances under which the undertaking was given might be inferred from the recitals of the undertaking itself, or

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whether it was requisite that the plaintiff should have averred them independently and directly, in addition to setting forth the undertaking. Upon this question the court were divided; the majority being of the opinion that the complaint was good. Upon the other points raised, the three judges were agreed, and Judge Woodruff states the opinion of the court.

*E. W. and G. F. Chester*, for appellants.

*C. N. Potter*, for respondent.

DALY, J.—The plaintiff avers that an action was commenced, and that in the course of such action, such proceedings were afterwards had, that the defendants made and delivered to the plaintiff the undertaking which is set forth.

The inspection of the instrument shows that it is the kind of undertaking provided for by the statute, in an action brought to recover the possession of personal property, and I think that the averment in connection with the undertaking indicates, with sufficient certainty, the nature of that action.

The recitals, moreover, in the undertaking, describe, with all necessary certainty and precision, an action in which the plaintiff claimed the delivery to her of certain personal property, for the delivery of which, in the event of the action being determined in her favor, the defendants became bound; and I know no good reason, under our present system of pleading, why the recitals in an instrument averred to have been executed by the defendants, should not have the same force and effect in a pleading as a specific averment alleging the truth of that which the defendants have admitted by executing the instrument.

I think it is sacrificing too much to form, to hold that where an instrument is set forth in a pleading embodying certain facts admitted by the execution of the instrument, that they are not to be taken as facts constituting a statement of the cause of action, without a formal averment of their truth.

The real object of a pleading is to apprise the opposite party of the nature of the claim or of the defence, and where substantially it performs that office, it is all that is required. The present pleading, in my judgment, does so. It could not have

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the effect of misleading the defendant. The nice discrimination of the counsel who raised the objection upon the trial, may have detected in it a want of that precision and exactness which, before the Code, was deemed essential in setting forth a cause of action, but I think, under the less formal system that now prevails, that it discloses the nature and causes of the action, with sufficient legal certainty. That it notifies the opposite party sufficiently of the nature of the claim intended to be made, and that to uphold such objections would be in effect to determine that technical certainty in a pleading is as necessary now as it was before, and that the abolition by the Code of all the forms of pleading which had previously existed has been productive of no other result than to leave things precisely where they were.

As my brethren are agreed upon the other points which I ruled at the trial, it is simply necessary, those points having been re-argued, to express my general concurrence.

INGRAHAM, F. J.—I do not think the case of *Shaw v. Tobias*, (3 *Comst.*, 188), renders it necessary for us to decide that the complaint in this case is defective. Although the declaration in that case was not deficient in the allegation as to the nature of the action, and therefore not open to the same objections as made in this case, still the remark of the chief justice may be applied to this. He says the bond, as set forth, appears to be a bond within the statute which is a public act of which the court should take notice. (26 *Wend.*, 502.)

In *Loomis v. Brown*, (16 *Barb.*, 325), the Supreme Court held that in an action on a bond given on the granting of an injunction, it is sufficient to aver that an injunction was granted in a suit, by a justice of the court. The judge says, "the complaint sets forth the nature of the suit, so far as to say that an injunction was granted in it by a justice of the court, that issues were joined and judgment rendered." This is a sufficient statement. The judge adds, "if it were not, it is the better opinion, that after parties have obtained an injunction, and stayed their adversaries' proceedings, and the latter have suffered damage thereby, it is too late for the plaintiff in the first suit to set up for a defence to the suit on the injunction bond

a want of jurisdiction to grant the injunction. They are estopped from raising the question."

The application of these remarks to the present case would sustain the complaint, and under the present system of pleading, when the defect, if it exists, is one which has in no way misled the defendants, they should not be allowed to take the objection.

Nor do I think it necessary to aver that the property was returned. The giving of the undertaking deprived the plaintiff of the right to demand the property from the coroner. It then became immaterial to her what the coroner did with the property, nor was she bound to follow it, and see to its delivery by the coroner. Her remedy against the property ceased, and she was left to the undertaking alone for redress. After the giving of the undertaking, the coroner held the property for the benefit of the defendant in the original action. The plaintiff could no longer interfere with it, and the failure on the part of the coroner to perform his duty does not deprive the plaintiff of a security for property which belonged to her, and which the giving of the undertaking prevented her from claiming from the coroner.

In other respects, I agree with Judge Woodruff. Under the views I have expressed, the judgment should be affirmed.

WOODRUFF, J.—This action is prosecuted by the plaintiff, upon an undertaking signed by the defendants, which purports to have been given to the plaintiff, in an action brought by her against Thomas Carnley, sheriff, &c., in which she claimed the delivery to herself of certain personal property, and in which she had caused the same to be taken by the coroner. And after reciting such action, and the taking of the property by the coroner, the instrument declares that for procuring the return of such property to the defendant (Carnley), and in consideration thereof, the defendants herein (Colton & Heath) undertake and become bound to the plaintiff in the sum of one thousand dollars, for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to her of such sum as may for any cause be recovered against the said defendant (Carnley) in that action.



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In declaring upon this undertaking, the plaintiff avers that she commenced *an action* in the Supreme Court against Thomas Carnley, and that in the course of such action such proceedings were afterwards had that the present defendants made and delivered to her a certain undertaking in writing, "whereof the following is a copy," setting forth a copy of the purport above stated, and making profert of the original, and then further avers, that she afterwards recovered in the said Supreme Court judgment in said action against the said Carnley for ten hundred and eleven dollars and fifty-six cents, and that the defendants, though often requested so to do, have not paid the said judgment or any part thereof, but the same remains wholly due and unpaid.

The answer consists of three parts.

First. That the judgment against Carnley is good, and might be collected by an execution against him, but that the plaintiff, by some fraudulent agreement or understanding with Carnley, is by this action endeavoring to collect it from the defendants as his sureties, instead of collecting it from him.

Second, That the plaintiff has no cause of action against the defendants, until an execution against their principal, (Carnley,) has been issued and returned; and that none had been issued.

Third, That the complaint does not state facts sufficient to constitute a cause of action.

Upon the trial, the court directed the jury to find a verdict for the plaintiff upon the pleadings; neither party producing or offering any evidence; and upon their verdict for the sum named in the undertaking, with interest thereon from the alleged date of the judgment against Carnley, the court at special term ordered judgment, from which the defendants have appealed.

As no fact alleged in the complaint is denied by the answer, and as the defendant offered no proof of any matter alleged in his answer, it is obvious that there was no question of fact to be submitted to the jury.

It is equally obvious, that if, before the plaintiff could maintain her action against these defendants, she was bound to

issue an execution against Carnley, she should have averred the issuing of such execution in her complaint.

The question therefore before the court, and the only question, was whether the plaintiff's complaint contained a statement of facts sufficient to constitute a cause of action against the defendants.

There is no warrant in the Code for inserting in the answer, as has been done here, the claim that the complaint is insufficient; such a claim is a demurrer, and nothing else, and although a defendant may demur to one or more of several causes of action, and answer the residue, (*Code*, § 151), he may not answer and demur to the same, or to the whole alleged causes of action.

This is not very material in this case, since it was competent for the defendant to insist upon this objection when the plaintiff sought a judgment upon her complaint; that objection, whether set up by demurrer or not, being preserved to her by the provisions of the 145th section of the Code.

The question therefore to be considered on this appeal, is whether the judge was warranted in charging the jury, that upon the admitted facts stated in the complaint, and without even the production of the alleged undertaking, the plaintiff was entitled to recover.

This question was argued by counsel for both of the parties upon the assumption that the undertaking must be sustained, if at all, as an instrument executed in pursuance of the provisions of an express statute, and not as an agreement voluntarily entered into irrespective of the statute, upon a consideration moving to the parties.

And it seems to me plain that unless there is enough in this complaint to show that the understanding in question was given and received under the provisions of section 211 of the Code, the plaintiff has failed to show a cause of action. Viewed as a mere agreement, there is no consideration acknowledged, and there is no reciprocal agreement made, or duty assumed by the plaintiff. She does not in consideration of the defendant's undertaking, agree to relinquish her claim to the property taken, or consent that it be returned. The consideration does not purport to be past nor present; but is

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wholly *future, executory* and *conditional*. It is for procuring the return of certain property to Carnley, which he desires to have returned to him, and in consideration thereof, the defendants undertake, &c.

Something then remained to be done which was not yet done, to gratify Carnley's desire, and to procure that, the defendants became bound. As no consideration advantageous to the defendants appeared in the instrument, and as no consideration or prejudice to the plaintiff could arise until or unless the property was returned to Carnley, the plaintiff should have averred that the return of the property (for the procuring of which the undertaking was given), was made; and had the plaintiff so averred, the complaint would, in my judgment, have been good, even if no statute could be found providing for the making of such contracts. As for example, suppose the defendant in an action of replevin, as formerly conducted, when there was no such provision to enable him to keep the possession of the property replevied, *pendente lite*, had desired to do so, and to that end had procured these defendants to execute a similar agreement with the plaintiff, whereupon the property was by his consent, returned to such defendants. I know of no ground upon which, upon an averment that the consideration was so executed by the plaintiff, the defendants could have denied their liability.

In the absence of any averment that the property was returned to the defendant, no consideration, either of benefit to the defendants or their principal, Carnley, nor of prejudice to the plaintiff in any wise appears. And therefore, if the question before us be considered irrespective of the statute, (under which it is claimed by the plaintiff that the undertaking was given), the plaintiff does not show by his complaint that the defendants are liable to him upon the instrument. Even if it could be properly insisted that by accepting such an instrument, the plaintiff became bound to permit or procure a return of the property, the case would be no stronger than one where there was mutual and dependent agreement in which, as where future performance by the plaintiff is the consideration of the defendant's agreement, the plaintiff must aver performance on his part.

But the plaintiff insists that the undertaking is a statute security, and is given in the form prescribed by the statute, and that therefore there was no necessity for expressing a consideration.

The original defendant, Carnley, in an action in which his personal property was taken from him, upon a claim pursuant to chap. 2 of title 7 of the Code, (formerly called the action of replevin), had a right to the return of his property upon delivering first such an instrument as is set out in this complaint, and the instrument is therefore a valid obligation.

In this I think he is correct. Where a statute prescribes the giving of an instrument, and its purport, it is consideration enough that it is given pursuant to the statute and has its sanction. The defendant will not be permitted to claim that he complied with the requirements of the statute without effecting the purpose of those requirements. *To satisfy the statute*, is consideration enough upon which to rest the obligation assumed.

Nor is the objection that the undertaking should have been made to the sheriff instead of to the plaintiff, well founded. It is an instrument prescribed in a statute which has introduced great changes in the course of proceedings upon choses in action, a statute which allows the party in interest to prosecute in his own name, when he is the sole party in interest. The instrument is taken for the plaintiff's benefit, and is by its express terms to secure the payment of the judgment to her. I think indeed that the words "to the plaintiff," which follow "become bound," might have been omitted, and yet the instrument would have operated in her favor and been equally valid by force of the statute, and of her interest in the subject matter.

It may even be that without those words, the sheriff might make it available to himself, in case he should deliver the property to the defendant before his sureties have justified, and he himself were held by the plaintiff responsible, (§ 212), and possibly the legislature intended that the sheriff might take an undertaking which should operate for the benefit of whom it might concern; but if this be not so, the sheriff, even if he prepared the undertaking so as to confine the benefit thereof to the

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plaintiff and exclude himself, prejudiced no one but himself, and the defendants should not be permitted to object that the indenture is given in form to the person for whose especial and immediate benefit it was intended.

Nor in my opinion was it necessary that the plaintiff should aver the issuing of any execution against the former defendant, Carnley. The undertaking of the present defendants was original and absolute, that the property should be delivered, if a delivery was adjudged, and that the sum which the plaintiff recovered, should be paid to her. There is no qualification or condition in this respect. They did not agree that the money could be collected, but that it should be paid. The plaintiff had nothing to do but recover the judgment, and then the duty of the defendants was complete. The averment that the judgment was not paid, is stating a clear breach of the undertaking.

But the question recurs, does it appear by this complaint, that this instrument was made and delivered in compliance with the statute, so that its force and validity can be supported by it; for (as above suggested), if regarded as a mere agreement between the parties, the complaint is defective. And upon this question I feel constrained to say that the complaint does not show that it was taken in pursuance of any statute, nor show facts from which we can say that it was so taken. It is quite true, as was held in *Shaw v. Tobias*, (3 Comst., 188), that in declaring upon a statutory security, it is not necessary to *aver in terms* that it was taken or given pursuant to the statute; but it must appear that the facts existed to which the statute applied—for else it could not appear that it was a statutory security, and such is the whole scope of the decision referred to.

The plaintiff here states, and only states, that she commenced an action, and that such proceedings were had therein, that this undertaking was made and delivered. Now if our statute provided that in all actions, such an instrument might be given for the purposes mentioned therein, this might be sufficient. But it is only in *the action* formerly called *replevin*, that the statute recognizes any such security, and I know not how to avoid the conclusion that if the plaintiff wished to set up the

instrument as a statutory security, he should have averred that it was made and delivered in such an action. For aught that the plaintiff has averred in the complaint, the action against Carnley may have been for goods sold and delivered, or any other cause.

It is true that the recitals in the undertaking are to the effect that the action was replevin, and the averment is that the defendant made and delivered an instrument containing those recitals; but this is no *averment* of their truth. Had there been an *averment* that such was the cause of action, these recitals would have been *evidence* that such *averment* was true. They may be very valuable as admissions to bind the defendants; but until the plaintiff has made some averment to be supported by them, they are of no avail to him. In short, while they are a proper if not a necessary part of the instrument required by the Code, and might very properly be set forth in the complaint, they are evidence of facts, and not averments.

The case of *Shaw v. Tobias*, above referred to, is cited to us as showing that recitals in the instrument may be taken in the place of averments.

That case warrants no such conclusion. There the plaintiff had declared upon a replevin bond, without averring in terms that it was taken pursuant to the statute. The court held that such an averment was not necessary. The form of the bond in that case, was such as the statute prescribed, and so is the undertaking in the present. But there the plaintiff had *averred* the replevin, and that the bond was given for the prosecution of the replevin suit, that on the giving of the bond, the replevin suit was commenced, that the goods were taken in pursuance of the writ issued for that purpose, and all the facts which were necessary to show that a bond in *that form* was given *in a case* within the statute. The court therefore knew judicially that the bond was taken pursuant to the statute as well as with it. Here we know judicially that the undertaking is in *a form* prescribed by the statute; but whether it was made and delivered in a case within the statute, we are not informed, and cannot know without an averment. There, as said in the opinion of the court, *the bond, as set forth*, appeared to be a bond within the statute, which is a public act of which

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the courts should take notice. That is to say, the bond was set forth by averring its making and delivery in a form prescribed by statute in an action and for a purpose within the provisions of the statute. So that every fact showing that it was a statutory bond was alleged, and the court, (bound to take notice of the statute as a public act), could therefore judicially declare it to be such a bond. But the court could not judicially know from the form of the bond alone, that it was given in a replevin suit, however they might know that it was in a form appropriate to such an action.

In the case of *Loomis v. Brown*, (16 *Barb. S. C. Rep.*, 325), the court sustained a declaration upon a bond given on the granting of an injunction. But there the declaration *averred* the *existence* of the *circumstances* which made the giving and taking of such a bond, proper, to wit: the commencement of a suit *in which an injunction was granted* by a justice of the court, and in which issues were joined and judgment rendered. The complaint there did set forth just what the pleader here has omitted, viz: the nature of the suit, so far as to say that an injunction was granted in it. Had the pleader here set forth the nature of the action so far as to show that personal property had been replevined or taken therein, the cases might be deemed parallel.

In *Ring v. Gibbs*, (26 *Wend.*, 502), the complaint also averred the pendency of proceedings in which such a bond as was declared upon was appropriate, and therefore does not conflict with these views; and although other defects were urged by the defendant's counsel, the court felt at liberty to intend after verdict, that the proper proof was given supplying the defects. Here we are considering the question whether the plaintiff could recover upon these pleadings without any proof whatever—for such was the charge of the court.

In *Gould v. Warren*, (3 *Wend.*, 54), the court say of an action on the replevin bond, "the declaration should set out concisely *all the proceedings* in the replevin suit." And such were the forms of pleading on such bonds heretofore. (See *Chit. Pl.*, 212—216, and 3 *id.*, 244). And so also is the form given in 3 *Burrill*, cited by the plaintiff's counsel.

It is true that much of the minute particularity and detail

found in Chitty, may now be dispensed with; but I find no warrant for saying that it need not be averred that the bond was taken in or for the prosecution of an action of replevin. (*Phillips v. Price*, 3 *M. & S.*, 180, and note to 1 *Bos. & Pul.*, 381.)

I regret the conclusion to which I must arrive; but if the plaintiff relies upon his undertaking as a statutory security, I think he is bound to make such averments as show that it is not only such in form, but that the case in which it was given, was within the statute. I apprehend that a declaration on a bail bond which did not aver the issuing of the *capias* and the arrest, or a declaration on a bond for the jail liberties which did not aver the imprisonment, could not be sustained; and yet the recitals in such bonds disclose these facts.

The defect in the present complaint could easily have been supplied by amendment, and I cannot doubt that the court would have allowed such amendment at the trial. Indeed if section 176 of the Code could be so construed as to embrace such a case, I should be disposed to disregard the defect on this appeal. It is quite probable that the defendants would suffer no injustice. The admitted fact that the undertaking was executed by the defendants, is ample assurance that in truth the action was within the statute. But the court are only directed to disregard a defect "which shall not affect the substantial rights of the adverse party." And to say that we may affirm a judgment where it does not appear by the complaint that a cause of action exists, because we are satisfied that a cause of action does in fact exist, as matter of evidence, would I think, be pushing the construction of that section too far. The defendant has urged this very objection, and relied thereon from the outset, setting it up in his answer. I do not think we can now sustain his objection as well taken, and still disregard it. It is urged with some plausibility that an averment that the personal property mentioned in the undertaking, was returned to the former defendant, Carnley, is also necessary. That even regarding the instrument as a statutory security, it is necessary to show that it was acted upon. That the object for which it was given, was accomplished, and that the consideration (purely executory when the instrument was made and delivered), was performed. That it would never have



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been deemed sufficient in an action on the replevin bond, to state the purpose and object for which it was given, and its execution in proper form, without averring also the replevin by the sheriff. It should however be observed that a replevin bond was in the nature of an indemnity, and if there was no replevin, there could be no loss. While it is probably true here that even if the property were not returned to the former defendant, Carnley, the plaintiff lost by reason of the undertaking the right to *compel* the officer to deliver the property to him, and yet on the other hand, although it is argued that upon the delivery of this undertaking, Carnley could have compelled the return of the property to himself, still these defendants could not. It is however unnecessary to express an opinion upon this question.

The various objections made to the failure of the plaintiff to aver and prove the regularity of the proceedings in the suit against Carnley, seem to me unfounded. See *Gould v. Warner*, and *Shaw v. Tobias*, *supra*.

But for the reason above stated, I think the judgment must be reversed, and a new trial ordered—costs to abide the event. It is nevertheless a proper case for amendment, and the plaintiff should be permitted to amend his complaint in the particulars above referred to, if he desire to do so, before proceeding to such new trial.

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THE MAYOR, &c. OF THE CITY OF NEW YORK *a. MASON.*

*New York Common Pleas ; General Term, March, 1855.*

DISTRICT COURTS.—PLEADINGS AND PRACTICE.—LICENSES.

A justice of a district court has no authority to entertain a motion to strike out a complaint or answer, either in whole or in part.

The fact that the commissioners of excise for a particular ward or district refuse to license any persons to sell spirituous liquors, does not justify any person in selling them without a license.

Although a non-suit applied for on account of a defect in proof, might properly have been granted, yet if either party in the course of the trial supplies the proof which was before wanting, the objection is obviated.

In a suit for the statute penalty for selling spirituous liquors without a license, the burden of proof is on the defendant to show that he had a license.

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If a complaint in a justice's or district court, is not sufficiently certain and explicit, the defendant's only remedy is by demurrer.

The proper practice in the district courts of the city of New York in respect to *summoning, impanneling and challenging jurors*, defined.

Appeal from a judgment of the District Court for the third judicial district of the city of New York.

This was an action to recover the statute penalty for selling liquor without a license, alleged to have been incurred by the defendant.

The defendant by answer averred that he kept a public victualing house, in the ninth ward; that he was a citizen of good moral character, and that the commissioners of excise for the ninth ward, had refused to discharge the duty of granting licenses, had made public announcement that they would grant none, and had refused to grant an application for license made by defendant, &c. &c. The plaintiff's counsel moved to strike out these allegations from the answer, and the motion was granted.

The cause then came on to be tried, and resulted in verdict and judgment for the plaintiff; from which defendant appealed. The important grounds of appeal appear in the opinion.

*A. D. Russell*, for appellant.

*J. B. Haskins*, for respondents.

WOODRUFF, J.—The present is an action brought to recover the penalty given by statute for the sale, by retail, of spirituous liquors, to be drunk in the house of the defendant, he not being licensed according to law. (*Sess. Laws*, 1824, ch. 215, p. 256; *amended, see Sess. Laws*, 1827, ch. 280, p. 307).

Numerous objections to the rulings of the court below, were raised on the trial, and also to the testimony received in evidence, and no less than twenty errors are alleged in the notice of appeal, as grounds of reversal. But the defendant's counsel, on the argument of the appeal, urges very few of these objections; and as to those which the counsel appear to have abandoned, it will suffice to say that we think no error was com-

mitted in those particulars, which warrants a reversal of the judgment.

I. It is however, proper that we should say, that in our opinion, the justice had no authority to strike out one of the defences set up by the defendant in his answer on motion. The pleadings in the district courts are governed by section 64 of the Code of Procedure; and a demurrer is the only proper mode of raising an objection to a defence as insufficient. Upon such a demurrer the court may order an amendment; and if the party neglects or refuses to make such amendment as will render the pleadings sufficient, the defective pleading may be disregarded on the trial. (*Sub. 6 and 7*). But the justice has no authority to entertain a motion to strike out a complaint or answer, either in whole or in part. No such authority is expressly given to him, and he can take no such power by implication. And it is manifest that the exercise of such a power is inconsistent with the provisions of the subdivisions of the 64th section above referred to. By those provisions, it is made his duty to require an amendment, when he is of opinion that the objection to the sufficiency of the complaint or answer is well founded; and yet, by granting a motion to strike out, he violates this distinct provision.

If it be said that he may, after striking out a defence, suffer the party to amend, the answer is, that this is not in accordance with the course of proceeding prescribed for justices' courts.

But it does not follow that in this particular case, the judgment should be reversed upon that ground. If it appear that the matter set up as one of the defences, and so struck out, constituted no defence at all, and was so radically insufficient that no amendment could have made it a good defence, then, although we deny the power of the justice to grant the motion, and disapprove of his order striking out the so called defence, we may and ought to say that no injustice was done; the erroneous order did not and could not legally affect the result, and furnishes no ground for a reversal of the judgment.

In this we by no means design to sanction the practice; on the contrary, we regard such a departure from the prescribed course of proceeding in those courts, as so far erroneous,

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that we hesitate, in overlooking the error, and we think that it must be very clear that no injustice has been sustained in consequence, or we must reverse the judgment.

Another reason, however, exists in the present case for disregarding the error in question : all the matters averred in that part of the answer which was struck out, were given in evidence by the defendant, and became the subject of a distinct ruling upon their sufficiency as a defence, irrespective of the then state of the pleadings.

II. The first ground now urged by the counsel for the appellant, embraces the very question raised by the defence so struck out, and in respect to which the evidence of the facts was afterward received, viz: The appellant was the keeper of an inn or tavern, and as such was licensed to sell spirituous liquors, in the year 1853. His license expired on the first of May, 1854. He then applied for a further license, which he failed to obtain, and there was some evidence that the officers in whom the power to grant licenses for the ward or district in which the defendant resided, refused to grant any licenses whatever in their ward.

Assuming these facts, it is argued that this was a neglect of duty on the part of those officers, for which they might have been indicted; and that such neglect of duty operated as a general license to all persons whomsoever residing in the ward, to keep an inn, and sell such liquors, and especially all persons, citizens of the United States, possessing a good moral character, residing in such ward; and even if it did not operate as such general license, the defendant having been licensed down to the first of May, was relieved from the necessity of procuring a further license, but might continue to sell notwithstanding the term of his license had expired—the neglect of duty by the officers aforesaid thus operating as an extension of his term.

It seems to me that the mere statement of these propositions, shows their unsoundness. They seem to proceed upon a theory that the defendant and the commissioners of excise stand to each other in the relation of contracting parties, between whom the failure of performance by one, relieves the other from the obligations assumed by him; that the commissioners having

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refused to give the defendant a license, have no right to complain that he has no license.

The effect of such reasoning, is this: Commissioners, by neglecting their duty, (if a refusal to license the defendants, was a neglect of duty), may, at their pleasure, repeal or abrogate a law of the State. If the persons who in any district may for the time being be commissioners of excise, should deem it expedient to license everybody, they may practically do so by refusing to license anybody. Such a proposition hardly needs confutation.

The law of the State is explicit and unqualified, that every person who shall sell by retail, &c., &c., "*without being licensed according to law*," "shall forfeit and pay, &c." Being licensed "according to law," means licensed in the manner prescribed in the act. Now it is not in the *power* of commissioners of the excise, or of any other subordinate tribunal or officers, to abrogate the statute. Its provisions may be disregarded—the commissioners may even neglect their duties; but the statute will nevertheless stand, and if no person is licensed, then whoever sells, does so "*without being licensed*," and incurs the penalty, and it seems to me that the proposition that when *no one* is licensed, *all* are licensed, is too novel and extraordinary to call for discussion.

So in regard to the idea that the defendant "*held over*," under his former license. He had no vested right to sell spirituous liquors. The statute forbidding a sale without license, and giving to the excise commissioners authority to license such persons as they should deem fit and proper, forbids any such idea. The selection of the persons to be licensed, is purely a matter of discretion. If in one year they thought it fit and proper to license the defendant, the experience of that year might satisfy them that they erred in their former judgment. If in one year they deemed it fit and proper to license twenty persons to sell, the experience of that year might satisfy them that they had erred, and that the wants of the public would only require that ten be licensed the next year. And if in one year they deemed it fit and proper to license persons residing in a particular ward or district, the experience of that year might satisfy them that the interests of the public

would be better subserved by having no inns or taverns and retail drinking-shops within that district. I think it clear that the discretion vested in the commissioners, and exercised by them in this respect, is conclusive, and to that effect is *ex parte*, (Parsons, 1 *Hill*, 655), and that the right to sell spirituous liquors, which in the absence of any statutory provision, might be exercised by any one, has now, by statute, been converted into a franchise, and can be exercised only by those who have actually obtained a license. (See the Overseers of Crown Point *v.* Warren, 3 *Hill*, 150). I do not perceive what application the argument of the counsel, that the refusal of the commissioners to grant *any* licenses for the ninth ward, was a breach of duty for which they might be indicted as for a misdemeanor, has, to the right of the defendant to sell without any license. This proposition was also embodied in a request that the justice below would so charge the jury. (See *Rex v.* Young, 1 *Burr*, 556). I do not deem it necessary to consider at all whether the proposition is correct or not; for whether true or false, the sale by the defendant was none the less a sale, *without being licensed*.

If the commissioners neglect their duty and incur a liability to the public therefore, it will not avail the defendant. Even if their refusal to grant any license was a breach of duty they owed to the defendant himself, he must seek his redress by a proceeding against *them*, and not by a violation of an express law of the State.

The argument amounts to this: by refusing to give me a license, the commissioners neglect their duty, and therefore impliedly license me by their own neglect. In other words, I have a right to sell liquor in the ninth ward; if the commissioners grant me a license, then I am authorized to sell by virtue thereof; if they refuse, then their refusal operates as a license, and I am authorized to sell, because they so refuse; so that with license or without license my authority is complete, and whether the commissioners grant me a license or not is immaterial. I am not able to appreciate the force of this sort of logic. There is no such *right* in the defendant to sell. The commissioners have violated no *duty* to *him*, and no court

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can compel them to grant him a license, (*Exparte Parsons*, 1 *Hill*, 635), or justify him in selling without such license.

III. It is further argued that the court below should have granted a nonsuit, when moved for upon the ground that the plaintiffs had merely proved the fact that the defendant had sold, &c., without having also shown negatively that the defendant had no license. That the burden of proving this also was upon the plaintiffs.

If there was any foundation for this argument at the time the motion for a nonsuit was made, it is now too late to urge it, for it appeared in the subsequent steps of the trial from the defendant's own witnesses, that he had no license. If the defendant wished to avail himself of this supposed defect in the plaintiff's proofs, he should have rested upon his objection, so far at least, as not to supply the defect himself. No rule is better settled, than that where a nonsuit might properly have been granted for such a defect, if either party in the course of the trial supplies the proof which was before wanting, the objection is obviated.

IV. It was however held by the Supreme Court, in *Potter v. Devoe*, (19 *Wend.*, 361), where this precise point was before the court, that the burden of showing that the defendant had *no license* was *not* on the plaintiff; but on the contrary, that whether the defendant had a license or not, was a matter peculiarly within his own knowledge, and the burden of showing that he had a license was cast upon him by proof of the fact of a sale of the spirituous liquors. See numerous cases there cited to support the principle.

V. Another ground for reversal urged by the counsel for the appellant, is that the complaint did not specify the days upon which the alleged sales were made, with sufficient precision to warrant the proof.

"The statement in the complaint was that the defendant, on the 6th, 7th, 8th and 9th days, and on *each* and *every* of said days, did sell, by retail, strong and spirituous liquors, &c., to be drunk on defendant's premises," in said city, &c.

I do not perceive in what respect, if any, the complaint is not sufficiently certain and explicit. Had the plaintiffs named *each* day in any other language, e. g., on Tuesday, the 9th

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day of May; on Wednesday, the 10th day of May; on Thursday, the 11th day of May; and so on down to the sixth day of June, the complaint would have been no more definite, explicit, or certain, than to say on each and every day for thirty days previous to the said 6th day of June.

Besides, if the complaint was defective in this respect, it was a mere defect of form, only available under the general rules of pleading, formerly existing by a special demurrer, and is cured by verdict.

And still further, by the express provisions of section 64 of the Code, subdivision 5, pleadings in the district courts are not required to be in any particular form, provided, always, they are such as to enable a person of common understanding to know what is intended. The complaint here abundantly meets that requirement—and by subdivisions 6 and 7, when a complaint is *not* sufficiently explicit to enable the defendant to understand it, he may demur—and if the court deem the objection well founded, it shall order an amendment. This, then, is the remedy, if the complaint be defective in the particular under consideration. I am, therefore, clearly of the opinion that the objection itself was groundless, and if it were otherwise, the defendant cannot now avail himself of the objection, having answered to the writs and gone to trial without pursuing the mode pointed out by the statute to procure an amendment.

VI. A further ground for reversal is, that the jury, by whom the cause was tried, were not summoned and impaneled according to law.

The return states that the justice “caused a *venire* to be issued, in the manner required by law, to summon twelve persons named in a panel annexed thereto, being good and lawful men of the eighth and ninth wards of the city of New York, qualified to serve as jurors, to appear,” &c. On the appearance of the jury, the return states that the defendant’s counsel challenged the array on the ground that *too many* jurors had been summoned. This objection being overruled, and *six* jurors being drawn to serve on the trial, the defendant’s counsel objected to going to trial on the ground that *twelve* jurors *were necessary* according to law to try the action.



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It is impossible to say which of these two objections was deemed by the counsel to be well founded, for obviously both could not be. If twelve jurors were *necessary*, then summoning twelve was not summoning too many. I conclude, however, that he does not now think that there was any foundation for either objection, since on the argument of the appeal, he neither argues that *too many* were summoned, nor that too few were impaneled. The act relating to these courts, passed in 1813, (2 *Rev. Laws*, 1813, p. 374) section 95, prescribes the number to be summoned, and fixes it at *twelve*, and the same section fixes *six* as the number who shall be impaneled to try the cause. This statute, so far as it determines the number of jurors to be summoned, and the number to be drawn, has not been repealed or altered. The return states that the defendant further objected to the jury, that they were not selected by the *constable*. It is sufficient to say of this objection, that neither the statute of 1813, nor any other statute requires that the constable shall make such selection. The act of 1813 requires that the *justice* shall nominate in a panel the names of eighteen persons, and that the venire shall direct the constable, or marshal, to summon any twelve of these persons to appear. And in this respect, the return states that the venire was issued in the manner required by law, and the law of 1847, which will be presently considered, in no wise imposes upon the constable the duty of selecting the jury. But this objection was not urged upon the argument of the appeal. It does not appear to have any foundation. And even if it had, it would avail nothing, according to the views expressed regarding the remaining objection, which was, that the justice had no power to issue a venire to summon a jury. The grounds of this objection do not appear by the return, but it is argued by counsel upon the appeal that the act of 1847, (*Laws of 1847*, ch. 495, p. 734), has altered the law of 1813 in relation to the mode of selecting jurors for the district courts, and that jurors in those courts, as well as the other courts in this city, should, on requisition by the court directed to the county clerk, be drawn from the petit jury box in his office, and a certificate of such drawing should be delivered by him to the officer authorized to summon jurors for those courts.

Had this objection been taken by the defendant in his challenge to the array, I think it must have been deemed well taken. The statute last mentioned, in terms requires that the jurors hereafter to be summoned for the several courts authorized to try issues of fact in the city of New York, shall be drawn, upon requisition by such courts respectively, directed to the county clerk.

The district courts fall within this description, and all laws conflicting with the provisions of this act are expressly repealed. The manner of nomination and selection prescribed in the act of 1813, and the requirements of the act of 1820 (*Laws of 1820, ch. 1, p. 3*), directing that the jurors for these courts shall be summoned from the wards composing the district, are therefore repealed. And the justice therefore had no authority to issue a venire for jurors selected from the particular wards composing his district. He should have made a requisition upon the county clerk for the requisite number of jurors, and the certificate of the drawing by such clerk delivered to the constable would be his warrant for summoning them to attend. It is undoubtedly true that this practice will be found in some respects inconvenient, and especially when the jurors drawn reside at a great distance from the place of trial, but since it cannot be denied that those courts are authorized to *try issues of fact*, they must be deemed within the statute, and the legislature, and not the courts, must remedy the inconvenience, if any be found. That portion of the act of 1813 which limits the number of jurors to be ordered to eighteen, and the number to be summoned to twelve, and the number to be empaneled to six, remains unrepealed, and in the requisition to be made upon the county clerk, that act is doubtless in this respect to be observed in each case in which a jury is demanded. But in this particular case, the objection cannot, I think, avail the defendant; the irregularity in summoning the jury was ground of challenge to the array, and should have been made in the first instance. No such ground of challenge was taken, and after the jury were empaneled and sworn, it was too late. Courts have often granted new trials, even after verdict, for similar causes, where it appeared that injustice may have been

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done; but when the contrary was apparent, they have no less often refused. In the present case no conscientious jury, however summoned, could have rendered any verdict more favorable to the defendant than was rendered.

Challenges are to be presented to the court in their proper order, that they may be tried and disposed of in due succession, and so that, if the array be quashed, another jury may be summoned. Challenge to the array is first in order, and, after that is disposed of, then the party may present his challenge to the polls, and an objection to the array, if not made ground of challenge before the jury is sworn, is waived, and cannot afterward be insisted on as a matter of strict right; though in courts having power to grant new trials it may be considered, and will be allowed to prevail, to prevent injustice.

In the return, the swearing of the jury is not specifically mentioned, but it is apparent from the language of the return, not only that the array was not challenged for this cause, but that the objection was not made until after the jurors were drawn and ready for the trial. If in this particular the return is defective, the appellant should have caused it to be amended. I am aware that it may be suggested that this disposition of the question requires strictness in the due order of proceeding in justice's courts, but not more than is just. Indeed, I do not perceive how, after the jury are sworn, such an objection could be sustained without involving a discontinuance. After that stage in the trial, I very much doubt the power of the justice to discharge the jury and summon another for such a reason.

I conclude, therefore, that the judgment should be affirmed.

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*New York Supreme Court, Special Term; March, 1855.*

The old form of entering judgment upon bond and warrant of attorney to confess judgment, by declaration for the penalty of the bond, cognovit, and judgment for the penalty, is unauthorized under the Code.

The proper practice in entering judgment under the Code, upon confession, or upon bond and warrant of attorney, signed before July 1, 1848,—defined.

*It seems*, that in entering judgment upon a bond and warrant of attorney above five years old, it is necessary to give the defendant notice of motion for judgment.

Motion to vacate judgment.

The facts upon which the motion was founded, appear sufficiently in the opinion.

MITCHELL, J.—On the 16th of November, 1843, Smillie executed his bond to Allen, in the penalty of \$10,000, conditioned for the payment of \$3,000, and interest on demand; and on the same day also, executed a warrant of attorney to an attorney to confess judgment for him on that bond. On the 13th November, 1854, affidavits were made by the subscribing witnesses to these instruments, proving them, and on the 3d of November, the plaintiff made affidavit that the consideration for the warrant of attorney, was land sold by him to one Peter Law, who gave to him a bond and mortgage for the payment of part of the purchase money; that Smillie bought subject to that mortgage; that the plaintiff commenced a foreclosure of the mortgage; and that the bond and warrant of attorney were given in settlement of a balance *due on said bond and mortgage*; that the \$3000 and interest, from 16th November, 1843, were still due, and no part of it paid; that the plaintiff had, on that day seen and conversed with the defendant; and that he was alive at 10 A. M. of that day.

On these papers the plaintiff made an *ex parte* application to the court, without any notice to the defendant, and obtained an order to enter up judgment, pursuant to the direction contained in the warrant of attorney, for the sum of \$3000, and interest from 16th November, 1843. The plaintiff's attorney also made affidavit that the amount of the indebtedness, by the condition of the bond, was \$5,309.

The plaintiff on these papers entered up judgment on 16th November, 1854, precisely in the old form of a judgment on a bond and warrant of attorney to confess judgment, filing a declaration in debt for \$10,000, a covenant signed by an attorney admitting that the defendant owed the \$10,000, and a judgment for the plaintiff to recover the said debt. The judgment was signed by the judge on the 22d November.

It now appears that the bond and warrant of attorney were not given on settlement of a balance due on said bond and mortgage, but that that mortgage was reduced to \$8000, and a suit for foreclosure of a subsequent mortgage by defendant came

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on to a decree and sale, and that the plaintiff bought at such sale the land above mentioned, subject to the \$8,000 mortgage, and so satisfied that mortgage; and the plaintiff in reply to the moving papers, makes his affidavit that according to his recollection and belief, a judgment was entered in his favor against the defendant, for the balance due to him, and that on the 16th November, 1854, this was arranged, and the judgment against the defendant released, and the bond and warrant of attorney for the \$3,000 and interest, given by the defendant, and that the \$10,000 mortgage was never foreclosed, but was merged in the plaintiff's purchase.

It appears also that the plaintiff was advised by his counsel that it was necessary before entering judgment on the warrant of attorney, to show that the defendant was alive; that he called to ascertain that fact, and then, instead of stating his object or demanding payment, or giving any notice of his intention, he told the defendant that happening, in passing, while looking for another person, to see defendant's name on the door, he had looked in to see how defendant was; also, that an execution was issued and delivered to the sheriff, who never called on the defendant with it, and that thereupon summary proceedings were taken against the defendant.

The plaintiff argued that the judgment was regular, as it conformed to provisions of the Revised Statutes, and that those provisions were still in force.

A declaration or complaint, plea or answer, and the judgment thereon, belong to the class of pleadings rather than of practice; the term *practice*, relates principally to the time and manner in which the pleadings and process are to be served or entered. A book of pleadings is complete which does not mention the latter subject, and a book of practice is complete which does not speak of the form in which a pleading or judgment is to be drawn. The Code (§ 140), abolished all form of pleading heretofore existing, and declared that thereafter the forms of pleadings in civil actions in courts of record, and the rules by which the sufficiency of the pleadings were to be determined, were those prescribed by that act. The old system of pleading was therefore repealed, when it differed from the Code. An old declaration in debt for the penalty, a *cognovit*

for that debt and a judgment for the penalty of the debt, are now all unauthorized.

It was said that section 469 saves the old rules and practice of the court where consistent with the act. It does; but the pleadings are neither parts of the rules nor of the practice.

There are two forms of judgment allowed under the Code; one when the action is by summons, and the other when it is by confession without action. Sections 382, 383, 384, apply to the last, if the confession is made since the Code took effect; but the Codifiers also provided for the present case, where the bond and warrant of attorney were given before the 1st of July, 1848, when the Code first took effect, and prescribed the manner in which judgment should be entered in that case: namely, in the manner provided by sections 382, 383, 384, upon the plaintiff's filing such bond and warrant of attorney, and the statement signed and verified by himself in the form prescribed by section 382. (Code, §429). They have thus expressly provided for the pleadings and the manner of entering judgment in this case, and made that express provision the rule, and so abolished any not conformable to it.

Those sections form chapter third of title 12, and the first allows a judgment by confession in the manner prescribed by that chapter; then § 383 requires a statement in writing to be signed by the defendant and verified by his oath:—1st, stating the amount for which judgment may be entered, and authorizing the entry of judgment therefor. 2d, stating concisely the facts out of which it arose, and that the sum confessed, is justly due or to become due. Section 384 requires this statement to be filed with the clerk of the court, whose duty it becomes to indorse upon it, and enter in the judgment book a judgment for the amount confessed, with \$5 costs and disbursements, and it declares that this statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll, and execution may issue thereon.

Assuming that section 424 means to substitute the plaintiff in place of the defendant, in making the statement, and not to require his statement in addition to that of the defendant; there could not well be conceived a greater departure from the requirements of this chapter than this case presents.

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• This chapter, with § 424, abrogates in effect the old declaration in debt for a penalty, and the judgment for the penalty, and the power of any attorney to appear on an old bond and warrant of attorney to confess suit or judgment. It substitutes as the judgment roll the original bond and warrant of attorney, and the statement required by the above chapter, and the indorsement by the clerk upon the statement of a judgment for the amount confessed with costs; and that amount by subdivisions 1 and 2 of section 383, is the amount "justly due," not the penalty.

The statement thus required, should show "concisely the facts out of which it (the amount due), arose." This requires a *true* statement of those facts. The plaintiff's statement as filed, alleges the inducement to the giving of the warrant of attorney to have been, a suit commenced by him to foreclose a mortgage of \$10,000, and a settlement of the amount due on that mortgage. His own allegation now is that this was a mistake arising from his haste, and that that mortgage was merged in a purchase made by him, and that the indebtedness was a balance on another mortgage given by the defendant. These are two entirely different causes of action; and the statement on file is not true, and so does not comply with the Code, and cannot sustain the judgment. The chapter quoted, requires the judgment to be for the amount justly due—this is for nearly double that amount;—it requires the judgment to be indorsed on the statement and entered in the judgment book; this was not indorsed on the statement, and it does not appear that any entry of it was made in the judgment book. The order of the court was to enter judgment for the \$3,000 and interest; but it was entered for the penalty.

An omission of the clerk of the court, or a slight omission of the attorney, when the proceedings are all correct in other respects, may be amended *nunc pro tunc*, even on the motion to set aside the proceedings. (*Wright v. Alden*, 3 *How. Pr. R.*, 213). But a departure in many material respects from the requirements of a statute, not by the clerk of the court only, but by the party and his attorney, should not meet with the same favor; especially when there was a ready opportunity to give notice to the opposite party of the motion for judgment,

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and that was designedly avoided. That the defendant may dispose of his property if notice were given to him, is no reason for a different rule. If the defendant would honestly prefer another creditor, and the law allows it, the court should not, by aiding an irregular course on the part of the plaintiff, defeat this right of the defendant. As well might it give judgment in the first instance without a summons being issued, when the defendants would not confess judgment, and then from the same motive let a summons served afterwards, retrospect so as to save the judgment. If one in the "race of diligence," as it is sometimes called, in his haste, stumbles and falls, so that another who observes the requirements of the law, reaches the goal before him, there is no great reason for preferring the violator of the law to the one who reverently observes it. If the fear was that the defendant would fraudulently transfer his property, the law affords a remedy against such an act, and the plaintiff should trust in it.

The judgment was irregular, even according to the old practice; the judgment roll was signed by a judge of the court, and not by the clerk. The judiciary act required all records of judgments and enrollments of decrees to be signed by the *clerk* of the court, filing the same, without any fee or charge therefor. (*Laws of 1847, p. 335, ch. 280, § 53; and see Manning v. Gregor, Code Rep. N. S., 43*).

The question was argued also, whether it was not necessary to give the defendant notice of the motion to enter judgment when the warrant of attorney was over 10 years old. Justice Bronson expressed himself inclined to the opinion that it was necessary; (in *Manufacturers' Bank of Philadelphia, v. St. John, 5 Hill, 499*). Graham, in his *Practice, (p. 774)*, is of the same opinion; under our present system, by analogy, notice should be necessary even when the bonds and warrants are but five years old. A judgment is of much higher order as evidence of debt, than a bond and warrant of attorney, and by the Code, (§ 284), after the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion with personal notice to the adverse party, unless he be absent, &c. This is on the principle that after five years, the defendant is not to have an execution issue



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against him, without an opportunity to show why it should not issue; and if applied even after judgment against him, much more should he have this opportunity when no judgment is yet obtained. If no notice be required in these cases, before judgment is entered, then the plaintiff who has delayed ten years and over to enter judgment, may issue execution without notice, when one who had obtained the record evidence of his claim, cannot do so. Whatever doubt may have existed as to the necessity of notice before entering judgment on a bond and warrant of attorney, after a lapse of ten years, under the old system, is removed by this provision. (See also *Currie v. Noyes*, 1 *Code Rep. N. S.*, 198).

The judgment, with all subsequent proceedings, are set aside, with \$10 costs of motion.

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*New York Common Pleas; General Term, March, 1855.*

#### LIEN LAW.—RIGHTS OF SUB-CONTRACTORS.

Where a contractor with the owner, for the performance of work, &c., towards the erection of a building, abandons the work before any payments become due, and wholly fails to perform, so that according to the terms of the contract, the owner is not liable, the laborers and sub-contractors cannot, by filing notices with the county clerk, acquire liens upon the building, or lot of ground, and compel the owner to pay them for the work and labor actually performed by them.

Nor can they establish such lien and right to recover from the owner by proof that the original contractor was induced to enter into the contract by the owner's fraud and false representations regarding the subject of the contract.

Even if it be conceded that the original contractor in such case, instead of suing for the deceit, and claiming damages therefor, has the option to waive the tort and sue for the value of the work and labor, his laborers cannot exercise that option for him; they cannot waive the fraud practiced on their employer, or relieve the owner from the liability for damages incurred by the fraud.

The claim of the laborers and sub-contractors in such case, is not within the lien law.

Appeal from a judgment of the District Court for the sixth judicial district of the city of New York.

This was one of nine suits, in which mechanics' liens were claimed by the different plaintiffs, against the defendant, for

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work done, &c., by them, in pursuance of a contract with one William Henderson, who was a contractor with the owner. By stipulation, the appeals in the other suits were to abide the event of this.

The facts involved, appear sufficiently in the opinion.

*T. J. Glover*, for appellant.

*J. B. Sheys*, for respondent.

WOODRUFF, J.—The proceeding in which the present appeal is prosecuted, was commenced in the district court upon an alleged lien, under the law known as the mechanics' lien law, and under the following circumstances :

On the 3d day of July, 1854, the defendant, being an owner of a lot of ground in Thirty-first street, in this city, made a written agreement with one William Henderson, by which the latter agreed to blast out the rock and clear a place for a cellar, and also for a privy and sewer, for the sum of one hundred and twenty dollars, the same to be completed by the 25th day of the same month—"no payments to be made until completed, except what should be considered necessary by *both* parties."

In pursuance of this agreement, Henderson began the work and employed the plaintiff as a laborer therein. After the contractor had made some progress, and had received \$35 on account, he quitted the work ; and the reason therefor alleged by the claimant herein, and testified to by the contractor on the trial, was that he found that he had been deceived by the defendant, who had, prior to the making of the contract, misrepresented to him the condition of the lot of ground, and the nature of the excavation, in respect to the quantity of rock which the lot contained.

Thereupon, the laborers employed by the contractor filed notices with the county clerk to create liens for the amount or value of their labor ; and now claim to recover such amount or value by the proceeding instituted in the court below ; and judgment being rendered against the owner, he prosecutes his appeal to this court.

It is not claimed that under the agreement made by the

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owner with the contractor, any sum whatever is payable to the latter. The work specified in the agreement was never completed, and payment therefore has never become due. •

The right of the claimant to maintain this proceeding is alleged upon the sole ground that the owner practiced a fraud upon the contractor to induce him to enter into the agreement. That the agreement was therefore not binding upon the latter, but he had a right upon discovery of the fraud to refuse to go on with the work, and to sue for and recover for the value of the labor actually expended upon the lot, which in his testimony he states was worth \$200.

How far the proof in this case established the alleged fraud, and whether, under the circumstances proved, the fraud was of such a nature as justified the contractor's failure to perform his agreement,—and whether the contractor did not discover the fraud, if any, long before he abandoned the work, but nevertheless affirmed the contract by continuing his labor until the time for the completion had expired,—are questions which would admit of some discussion. But taking the case as favorably to the claimant as it can be stated, and admitting all the facts to be as alleged by him, I apprehend that this proceeding cannot be sustained.

The statute authorizing the creation of liens in favor of mechanics and others, and the foreclosure thereof, does not apply to such a case. (*Laws of 1851, ch. 513, 953*). By the first section of that act, the persons who may require a lien are declared to be “Any person who, *by virtue of any contract* with the owner, or who in pursuance of an agreement with any *such contractor*, shall in conformity with the *terms of such contract*, performs work and labor, &c., in building, &c.,”—and the same section provides that the owner shall not be obliged to pay in consideration of all the liens authorized, any greater sum than the price stipulated to be paid in and by such contracts.

The second section provides that a person performing labor, &c., in pursuance of a *written* contract, shall produce it or give the best evidence thereof in his possession; and shall recover no more than the price stipulated to be paid to him in such contract.

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And the third section, that a person performing labor, &c., without a written contract, shall produce like evidence to establish the value thereof.

In the case before us, there was a written contract between the owner (the defendant) and his contractor for the work. That contract was not performed;—no moneys have ever become due thereon. It has been repeatedly decided that if no money has become due from the owner to the contractor, the owner cannot be compelled to pay anything to the laborer or sub-contractor. It is therefore plain that if the written contract which was given in evidence is of any force or effect whatever, the claimant was not entitled to recover.

But that agreement was of force to bring the parties within the express terms of the first section of the statute. There was an agreement with the owner, in pursuance of which and in conformity with the terms whereof, the work was begun and prosecuted so far as it progressed; and that was the contract, the only contract, made by the owner, and the only contract in which any price was stipulated to be paid for the work. This is the very case described in the first section of the statute, and yet the claimant does not show a case in which by reason of that contract, the owner can be required to pay anything more than he *has* paid. And therefore, regarding the work as done under or in pursuance of a contract with the owner, the claimant cannot recover.

The counsel for the claimant appears conscious of this difficulty, and hence he places his ground of claim upon the alleged fraud, and he argues that by reason of the fraud, the contract is a nullity, and therefore the rights of all the parties are the same as if there had been no contract whatever beyond a mere parol employment of the contractor by the owner, to excavate for just so long a time as the contractor did devote to the work. This is wholly unwarranted. So far as the rights of the parties rest in express contract, the employment was to excavate the entire cellar, privy and sewer, and not to work thereat by the day or for any number of days. Setting aside the contract as fraudulently obtained, it would not leave the owner and contractor under *any* contract with each other for the doing of the work.

But it is insisted, further, that the contractor had, by reason of the fraud, a right to repudiate the contract altogether, and then sue and recover for the value of the labor, &c., as upon a *quantum meruit*. I do not think it necessary to express an opinion in this case upon the question whether a party who has been induced by fraudulent representations to enter into a contract, can recover in an action for *work and labor*, upon any other basis than that furnished by the terms of the special contract. It has been held in England that he *cannot*, and that if he sues for work and labor, such an action is in affirmance of the contract itself, and must be governed thereby. But if he seeks to recover upon the ground of fraud, he should repudiate the contract when the fraud is discovered, and sue for damages for deceit. (*Selway v. Fogg*, 5 *Mees. & W.*, 83).

The question when and in what case a party may waive a tort and bring assumpsit to recover the value of whatever was obtained from him by such fraud, has been much discussed, and in this State is not fully settled.

But whatever may be the rights of the contractor in this respect, I am clear that his laborers and sub-contractors have no right to repudiate the contract between him and the owner. They cannot rescind it, and even if the contractor has the right to waive his claim for damages for the fraud, and sue for the value of the work and labor, they have no power to exercise that option in his behalf, and their doing so would not relieve the owner from the contractor's claim for damages for fraud, *as such*. The liability of the owner is upon the express contract for the price fixed, or, *according to the agreement*, for damages for the *fraud*; which latter the contractor *may waive* and recover the value of the work and labor done and performed. If this latter alternative be conceded, the case presented does not come within the letter or the spirit of the lien law. That, no where provides that where an owner fraudulently procures work to be done, by reason whereof he becomes liable in damages for the fraud thus practiced, the laborers and sub-contractors of the individual defrauded may have a lien, and may recover to the extent or

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amount of the damages to which such owner would be liable, and yet this is the argument contended for.

So if it be conceded that the contractor may elect to waive the tort, and sue for the value of the work done, the very proposition admits also that he *may not* make such election. He may sue for the deceit, and *non constat* that he will not. His employees cannot make that election for him. They cannot say there was no contract because of the owner's fraud, and there was an implied contract because the contractor, the only person defrauded, may, if he pleases, waive the fraud, and recover for work and labor as such.

I cannot resist the conclusion that this proceeding and the judgment therein are founded in error regarding the applicability of the lien law to such a case as the present. There is no especial hardship in this—there are multitudes of cases in which money is due, and yet in which the legislature have not provided any special and extraordinary means of compelling payment; and the plaintiff is in no worse condition than the creditors in such cases. It is only to be said that the legislature have not given to the laborer, in a case like the present, a right to acquire a lien. If it were needful, I think many reasons could be given why it would be unwise to do so, some of which might well be illustrated by the case before us; in which a contractor having failed to perform his contract, becomes in substance his own witness, not merely to excuse his default, but to prove a fraud on the part of the owner, by which he compels the payment of much more than the whole contract price, for the benefit of himself. But it is unnecessary to pursue that branch of the subject.

There are other grounds assigned for a reversal, but the reasons above given, dispose of the whole case, and in my opinion call for a reversal of the judgment.

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## SCHERPFF v. SZADECZKY.

*New York Common Pleas ; General Term, March, 1856.***EVIDENCE.—PROOF OF MARRIAGE.—EXAMINATION OF REPUTED WIFE.**

In an action for enticing away a man's wife, actual proof of the marriage is not necessary. Cohabitation, reputation, and the admission of the parties, is sufficient.

And certainly the admission of the defendant that the plaintiff and his alleged wife were married, is sufficient, without formal proof of marriage.

Where the marriage is denied, and the plaintiff has given sufficient evidence to establish it *prima facie*, the defendant cannot examine the wife to disprove the marriage.

A verdict against defendant in an action for enticing away plaintiff's wife, will not be set aside as excessive, unless facts appear which show that the jury were actuated by improper motives.

And the court will not infer this, merely from the amount of the damages awarded.

**Appeal from an order denying a new trial.**

This was an action for enticing away the plaintiff's wife.

The answer denied the enticing charged, and also averred on information and belief, that the plaintiff and Catharine Scherpf, referred to in the complaint as his wife, were never legally married.

In the course of the trial, before Woodruff, J., May 9, 1851, evidence was put in by plaintiff, tending to show that the plaintiff and Catharine Scherpf had for several years lived together as man and wife, were reputed to be such, and had frequently admitted that they stood in that relation to each other. It was also in evidence that the defendant had often spoken of Catharine Scherpf, as "Mrs. Scherpf," and had in conversation distinctly admitted that she was married to the plaintiff.

The defendant moved for a dismissal of the complaint, on the ground that no actual marriage between the plaintiff and his alleged wife, had been proved. The motion was denied by the court, and defendant excepted.

The defendant afterwards offered to prove by the testimony of Catharine Coombs, otherwise called Catharine Scherpf, the

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alleged wife of plaintiff, that there had never been a legal marriage between her and the plaintiff. To this the plaintiff's counsel objected, on the ground that she appeared to be the wife of plaintiff, and could not be called to testify against her husband.

The court held that as there was in the case *prima facie* evidence of a marriage, the witness could not be examined; and defendant's counsel excepted.

The jury having found for the plaintiff, damages \$10,000—being the amount claimed in the complaint, the defendant moved at special term for a new trial, on the grounds above stated, and also on the ground that the damages awarded, were excessive.

The motion was denied, and the defendant appealed to the general term.

So much of the opinion of the court at special term as relates to the questions of evidence which were argued upon the appeal, is as follows:—

WOODRUFF, J.—I have carefully reconsidered the arguments presented upon the motion for a nonsuit, urged on the trial, upon this ground, and more fully discussed upon this motion, and I still entertain the views expressed on the trial.

It is admitted that the general rule on this subject is, that evidence of cohabitation, reputation, and acknowledgment by the parties, a holding of themselves out to the world as husband and wife, is a sufficient proof of the fact of marriage.

But it is claimed, that as this rule is subject to exceptions, viz: that on an indictment for bigamy, the alleged first marriage must be established by proof of actual marriage, and that in actions for *crim. con.*, the same proof is necessary, so, upon similar principles, the same proof should be required in this case. The exceptions to the general rule have heretofore been said to be confined to the two cases above mentioned; but the Supreme Court in *Clayton v. Wardell*, (5 Barb. 214), held that upon an issue as to the legitimacy of a child, when the actual marriage of its parents was proved, nothing less than evidence of a prior actual marriage of the father should be permitted to establish the illegality of the second.



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I fully appreciate the propriety of requiring on the trial of an individual for an alleged crime, the highest evidence which the nature of the case will permit. Not only the presumptions in favor of a man's innocence, but the cautious jealousy with which the law protects the liberty of the citizen, may well forbid a conviction of a crime upon mere presumptions from circumstances, which, though true, are not inconsistent with innocence of the offence charged, when higher evidence may presumptively be given. And it may be, that the charge upon which it is sought to bastardize the issue of an actual marriage, ought to rest upon the same evidence; not only because the charge imputes to the father the crime of bigamy, but also because the consequences of sustaining this charge are of so grave a character, affecting the issue, and more serious than the loss of property, that such presumptions ought not to be entertained. At all events, I do not deem it necessary for the purposes of this case, to question the correctness of the decision of the Supreme Court.

But I am not aware that in any case in which the action proceeds merely upon the ground of making compensation for an injury either to a wife, or to a husband through the wife, or for the loss of a wife's services, any such exception was ever made; nor do I perceive the propriety of such an exception. The trial does not peril the liberty or the life of the defendant. It puts at hazard no question so serious as legitimacy, affecting not merely the inheritance, but the position in society of the issue for life, and it may also be, prejudicing their issue after them.

But it was ingeniously argued that the present action imputes crime as truly as an indictment for bigamy, since enticing away a man's wife, was punishable by fine and imprisonment so early as 3d Edward I.; and that therefore the presumption of innocence should prevail over, or at least should countervail, a presumption of marriage, founded on circumstances only; and counsel urge that the rule in actions of *crim. con.*, by which proof of actual marriage is required, supports this view.

I apprehend that this is an erroneous view of the rule. It is not true that when the facts necessary to support the civil action, are of a criminal nature, that the exception arises; nor

is the exception placed upon any such grounds. If it were, then in an action by the husband for the loss of service, by reason of an assault and battery of the wife, or in trespass by husband and wife for the personal injury of the wife, and especially if the assault were with intent to kill, the same necessity of proving actual marriage, would exist; for in each of these cases the plaintiff, to sustain the action, proves in fact the commission of an offence which may be the subject of indictment and punishment by fine and imprisonment.

The ground of the exception where it arises, is, that the action itself is penal:—*e. g.*, in indictments for bigamy; the proceeding involves the liberty of the subject,—the object is punishment—and no one shall be subjected to punishment, but upon the best evidence the nature of the case will allow.

The exception in actions of *crim. con.*, did not, I think, originate in the idea that the presumption of innocence is at least equal to a presumption founded in any circumstances short of actual marriage, but upon the very distinction which I have suggested.

The first reported case in which the exception in such an action was recognized, so far as I have been able to discover, was *Morris v. Miller*, (4 *Burr*, 2057), and that case has been ever since followed. In that case, Lord Mansfield does not place the rule that an actual marriage must be proved, on the ground that the facts alleged impute crime, but upon the distinct ground that “this is a sort of *criminal action* ;” that, “there is no other way of punishing this *crime* at the common law.”

The action itself is therefore peculiar, and the exception is stated in that case, to apply to no other action which is in form civil. And in *Birt v. Barlow*, (*Douglas*, 171), Lord Mansfield expressly places the exception upon this ground. He says, “An action for *crim. con.*, has a mixture of penal prosecution, and such an action is the only civil case where it is necessary to prove an actual marriage.”

I might suggest reasons of public policy—reasons founded in the great inconvenience, and oftentimes the impossibility of furnishing proof of actual marriage at a period in which migration is so prominent a characteristic of the age, and

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especially in a State where the law recognizes the validity of a marriage resting in contract between the parties unattended with any forms, ceremonies, or solemnities, and where registration in any form is not required, which to my mind, forbid the extension of the rule requiring such proof to new cases, and I am by no means inclined so to extend it in favor of one who voluntarily invades his neighbor's household, to seduce an acknowledged wife from her allegiance, and by such extension, to deliver him from his liability to make the husband just compensation.

The defendant insists that the judge erred on the trial, in excluding the alleged wife, when offered by the defendant as a witness to prove that she was not in fact the wife of the plaintiff.

The rule that a wife is not competent to testify against her husband, is not questioned; but it is urged that when the question whether the proposed witness is a wife or not, is the very question upon which the jury are to pass, she is competent. In other words, that the court cannot say she is the wife, and so exclude her; because that is deciding in advance the very question of fact which should be left to the jury.

A plausible answer to the defendant's argument, though perhaps liable to similar, yet to no greater criticism, may be stated thus:—If the proofs without her testimony, do establish the marriage, then the jury will so find, and the witness was in fact, incompetent. But if the plaintiff's proofs do not establish the marriage, then the jury will so find, and the defendant must have a verdict. So that to allow her to testify, is to assume that no marriage is proved, and if that be assumed by the court, then the plaintiff should be nonsuited, and no evidence from the defendant was necessary; while to exclude her testimony, is only to say that the court deem a marriage is *prima facie* established. If the jury should so find, then the exclusion is clearly proper; if the jury do not so find, then the exclusion works no prejudice, since the defendant has a verdict.

The true ground for rejecting her testimony, however, is not involved in either of these syllogistic processes of reasoning. These counter propositions may, however, be useful to a true

understanding of the rule. They both proceed upon the idea that the court may indulge in an assumption on the subject, although the assumption that she is a wife, would perhaps be shown to be false, if the witness were permitted to explain her seeming incompetency, and the assumption that she is not a wife, might be shown to be false by the verdict.

The defendant has no right to call upon the court to receive an offer which places them in such a position, or exposes their ruling to any such absurdity in its results. It is rather to be said that when the competency of the witness depends upon the very fact in issue, the witness is never competent. That competency is in doubt by the very state of the case, and there is no mode of removing the doubt but by the verdict. The embarrassment or hardship, if any, results from the very nature of the case, and the party who offers the witness, must bear the consequences of a difficulty that cannot be overcome.

In the present case, the plaintiff had shown not only cohabitation, general reputation, the holding out of each other by the parties to their friends and neighbors and the world, as husband and wife, the adoption by the alleged wife of the husband's name, and this during a long series of years, but had also shown repeated admissions by the defendant himself that they were husband and wife. I cannot doubt that this was sufficient to exclude her testimony.

It is no unusual thing that the court are required, in the progress of a trial, in ruling upon the admissibility of evidence, to infer, and say that facts are proved,—as, for example, that a witness offered is interested, or that a paper is lost, or that the execution of an instrument is established,—and yet these inferences may and often do involve the very questions upon which the jury are to pass. In such cases, the ruling by a court is in a sense provisional only; it is founded upon what the court deem *prima facie* proof. It is the defendant, in a case like the present, who calls upon the court to make an assumption, and that in the face of such *prima facie* proof. He offers the witness.

The law upon the proofs already given, declares the alleged wife *prima facie* incompetent, and the defendant now asks the court to assume that she is not the wife, and so to receive her.

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I apprehend he has no right, as a matter of law, to require the court to make any assumption but just the inference from the case as it then stands. So long as any rules touching the admissibility of evidence exist, they can only be administered by requiring the court to pass upon just such questions as these without any merely hypothetical assumptions, and to dispose of them upon the evidence appearing in the case, at the time when the testimony is offered.

The cases chiefly relied upon by the defendant's counsel were settlement cases, in which the alleged husband was not a party to the suit, nor interested in the event.

There are some cases in which the alleged wife was deemed incompetent to testify for her reputed husband, after long cohabitation and other acts creating a presumption of marriage, but these do not reach the present question. Nor do I find any case which conflicts with the above views, except that Peat's case (*Lew. Cr. Cas.*, 288), and Wakefield's case (*Ib.*, 279), are said to sanction an examination of a reputed wife on her *voir dire*, to prove the invalidity of the marriage. I am not able to perceive the propriety of such an examination, when the question of marriage is the very question for the jury.

The argument in its favor amounts to this: if she will swear she is not the plaintiff's wife, then she is competent to do so.

This is simply absurd, for she is offered for that very purpose; the offer of her testimony assumes that she will give it, if permitted. There is no occasion for an examination on her own *voir dire*; if, when sworn, she does not give evidence that she is not married, the offer and the evidence amount to nothing; and to say that, if she will give evidence that she is not married, she is therefore competent, is to beg the whole question.

I am still of opinion that the ruling on the trial was correct on this point.

*J. Cochrane*, for appellant. I. The offence of persuading away a person's wife was made indictable in England, by statute, 3 *Edw. I. ch.* 13. (*See 3 Black. Comm.*, 139). The statute law of England became, at the revolution, our law; (*Const. of 1777, sec. 35, Const. of 1846, art. 1, sec. 17*). There-

fore the rule which prevails in indictments for bigamy, &c., that actual marriage should be proved, applies in the present case; the reason of the rule being that proof of actual marriage is required to overcome the presumption which the law makes against acts of a criminal nature. (*Clayton v. Waddell*, 5 *Barb.*, 214; *Commonwealth v. Littlejohn*, 15 *Mass.*, 153).

II. The court erred in excluding the testimony of Catharine Coomba. The evidence of marriage between the witness and the plaintiff was merely *prima facie*. She was the best witness that could be called to speak directly upon the subject. (1 *Greenl. Ev.*, § 839; *Peat's case*, 2 *Lew. Cr. Cas.*, 288; *Wakefield's case*, *Id.*, 279; *Allen v. Hall*, 2 *Nott & Mc.*, 114; *Stevens v. Mops*, *Cowp.*, 593; *King v. Bromley*, 6 *T. R.*, 330; *Mace v. Cadell*, 1 *Cowp.*, 232; *Poultney v. Fairhaven*, *Brayt.*, 185; *Commonwealth v. Littlejohn*, 15 *Mass.*, 413; *Phil. Ev.*, 88 n. 163 and 192).

III. The damages are so extravagant, as to indicate that the jury must have been actuated by passion, partiality, or prejudice.

*C. Schaffer*, for respondent. I. No actual marriage need be proved. (*Taylor's case*, 9 *Paige*, 611; *Jackson v. Winne*, 7 *Wend.*, 47; *Morris v. Miller*, 4 *Burr.*, 2057 and 1 *Hill*, 270; 5 *Johns.*, 196; 3 *Mass.*, 317; 10 *East.*, 285; 4 *Johns.*, 58; and see *Linden v. Linden*, published in the *New York Sun*, 27th Jan., 1851).

II. The testimony of Catharine Scherpf was properly rejected. (*Babcock v. Booth*, 2 *Hill*, 181; *People v. Carpenter*, 9 *Barb.*, 580; 1 *Greenl. Ev.*, 409, § 339; 2 *Kent. Comm.*, 178).

III. The damages are not unreasonable.

INGRAHAM, J.—The exceptions taken on the trial of this cause to the rulings as to the admission of evidence, have been abandoned, and on this argument, the counsel have only submitted two grounds of appeal as to what took place on the trial, and an objection to the damages awarded, as being excessive.

I. The first point is, that the motion to dismiss the complaint should have been granted. This was upon the ground that direct proof of the marriage was not given; and that the

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act for which the defendant was sued being a criminal act, actual marriage must be proved.

After the full examination paid to this point by Judge Woodruff, I deem it unnecessary to repeat what he has so well said in regard to it, but only necessary to add our concurrence with him in the opinion, that in civil actions for this cause, actual proof of the marriage is unnecessary, and that the same may be proven by cohabitation, reputation, and the acknowledgment of the parties.

In addition, however, to this proof in this case, there is the clear admission proven of the defendant, made in the hearing of the witness Lekot, that the defendant spoke of Mrs. Scherpf as married, that she was married to Mr. Scherpf, who he said was in New York. Such an admission of marriage, in any other than a criminal prosecution, has been held sufficient evidence of marriage, even without proof of actual marriage. In *Rigg v. Curgenvew*, (2 *Wils.*, 395), it was said, in an action for *crim. con.*, that "if it were proven that the defendant had seriously recognized that he knew the woman was the plaintiff's wife, we think it would be evidence proper to be left to the jury, without proving the marriage."

And this has been held expressly to be sufficient in *Forney v. Hallacher*, (8 *Serg. & R.*, 159).

I think there can be no doubt, that under the evidence in this case, the motion to dismiss the complaint was properly denied.

II. The second objection is that the wife, when offered as a witness, was improperly excluded, and should have been received.

When she was offered as a witness, the proof of marriage had been sufficiently established to go to the jury on that question. The judge so held on the trial, by refusing the motion to dismiss the complaint, and we think his ruling was proper. If the evidence was sufficient for that purpose, surely in the absence of all proof to the contrary, the proof was sufficient to establish the marriage so far as to render the wife incompetent. The case shows that the person called as Catharine Coombs was the alleged wife of the plaintiff, and the person referred to by the witnesses as his wife. This established the identity of the person offered as a witness, with the person to

whom the witnesses had referred, and to whom the defendant's admissions related. I am at loss to see upon what ground a wife can ever be excluded as a witness for or against her husband, if this evidence was not sufficient proof of the existence of that relation between them, for that purpose.

It is said that she should be admitted where it is to prove the invalidity of the marriage, or in other words, that the wife who in all cases is prohibited from being a witness, because the law preserves inviolate the confidential communications between husband and wife, is to be admitted as a witness only in one case, and that a case to prove the adultery of the husband and her own.

We have been referred to no case authorizing the admission of the wife in such a case as a witness. The authorities cited by the defendant do not decide any such point. In principle and upon authority, as far as any can be found applicable, the rule is the other way. Cases may be found where a witness was not admitted to prove his previous marriage with a party to a suit. (*Broughton v. Harper*, 2 *Ld. Raym.* 752). So if a woman sues as a *feme sole*, a witness cannot be called to prove that she was his wife. (*Bentley v. Cook*, cited 2 *T. R.*, 265), and so in a case of settlement, where a marriage had been proven between two paupers, a witness to prove his former marriage with them was properly excluded. (*Rex v. Cliviger*, 2 *T. R.*, 263).

The ruling of the court was, I think, proper, and there was no ground for admitting the alleged wife as a witness.

III. The remaining objection applies to the amount of damages. It is alleged they are excessive. From the case and all the evidence, it must be apparent that the parties are not in a situation warranting such a heavy verdict, and the recovery of anything will probably be defeated by the large amount which the jury have given. Still the cause of action is one in which it is difficult to fix any limit to the amount, one which is peculiarly within the province of the jury, and the mere amount of the damages without some other fact to establish it, would not justify us in saying that the jury were actuated by improper motives in settling it.

The judgment should be affirmed.



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LANDAU *v.* LEVY.*New York Superior Court ; Special Term, April, 1855.*

## JOINDER OF CAUSES OF ACTION.—CLAIMS AGAINST TRUSTEES.

It is essential to a good complaint, containing several causes of action, that they should all belong to one of the classes mentioned in § 167 of the Code, and that they should be separately stated.

The allegations of the count, which purports to set out any one cause of action, should state enough to make it good in law.

Causes of action cannot be said to be separately stated, when it is necessary to recur to the allegations of the count which sets forth one of them, to supply omissions in the count, containing a statement of the other.

Judgment against the defendant personally, and as trustee, cannot be sought in the same action.

*It seems*, that in an action on a bill of exchange, payable in merchandize, an assignment for consideration by the payee to the plaintiff, should be averred.

## Demurrer to complaint.

This action was brought by Landau against Louis S. Levy, as survivor of Mark Levy and Louis S. Levy, partners, and Louis S. Levy, as executor of Mark Levy.

The action was upon two bills, drawn in the form of bills of exchange, payable in merchandize, drawn by the plaintiff on Louis S. and Mark Levy, as partners, and accepted by them; Mark having died, and Louis, the survivor, having been appointed his executor, the plaintiff now sought in this action to recover judgment against the latter, both as surviving debtor and as executor, it being alleged in the complaint that Louis was insolvent.

The substance of the allegations of the complaint, as well as the objections taken to it, are clearly stated in the opinion.

*Judah and Dickinson*, for defendant.—In this complaint, two causes of action have been improperly united, inasmuch as the defendant cannot be sued individually and as executor, in the same action. (*Code*, § 144. *Subd.*, 5 § 167. *Subdivision*, 7. *Alger v. Scoville*, 6 *How. P. R.*, 131. *Fry v. Evans*,

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8 *Wend.*, 530. *Gillet v. Hutchinson*, 24 *ib.* 184. *Hancock v. Haywood*, 3 *T. R.*, 433. *Slipper v. Stidstone*, 5 *ib.*, 493).

*E. R. Lamoreux*, for plaintiff.—Under the Code, it is no misjoinder of parties to unite the surviving partner with the representatives of the deceased partner, in an action on a contract made by the copartnership; especially if the survivor is insolvent. (*Code*, §§ 117, 118. *Ricart v. Townsend*, 6 *How. Pr. R.*, 460. *De Agreda v. Mantel*, 1 *Abbotts' Pr. R.*, 138. *Laurence v. Trustees of Lake & Watts Orphan House*, 2 *Den.*, 582. *Jenkins v. De Groot*, 1 *Cal. Cas.*, 122. 1 *Story's Equity Jurisprudence*, § 676).

Two several causes of action have not been improperly united, (*Code*, § 167). They all arise out of the same transaction or transactions, connected with the same subject of action, and fall under the first subdivision of section 167.

BOSWORTH, J.—It is essential to a good complaint, containing several causes of action, that all of them should belong to *one* of the classes mentioned in § 167 of the *Code*, and that they should be *separately* stated.

Each cause of action should contain in the allegations which express it, enough to make it good in law.

How many causes of action does this complaint contain?

It first alleges that the two Levys accepted a bill drawn on them by the plaintiff; they being partners. It then states the death of Mark Levy, before the bill matured, nonpayment, and payment of it by the plaintiff to the holder. This bill was dated the 26th of July, 1854, was for payment of the sum of £599 13 2 sterling, value in merchandize, on the 6th of October then next.

The complaint then proceeds thus:—

“And the plaintiff for a second and distinct cause of action, further shows,” &c.

It states the acceptance of a bill dated the 4th of August, 1854, drawn by plaintiff on the same parties, requesting them to pay on the 4th of November, 1854, the sum of £397 12 4, sterling, value in merchandize, the acceptance of the bill, the

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death of Mark Levy before its maturity, nonpayment of it, and that the plaintiff was compelled to pay and take it up.

This would seem to make a full, distinct, second cause of action.

The complaint without stating whether it was designed by it to set forth a third cause of action, proceeds to allege, the grant to Louis S. Levy of letters testamentary of Mark Levy, deceased, and that Louis S. Levy is insolvent, and prays judgment against him, "*absolutely, and as such executor,*" for \$4882 $\frac{80}{100}$  and costs," to be levied and collected of the property of the said Louis S. Levy, as such surviving partner as aforesaid or otherwise, or in default thereof, of the personal assets of Mark Levy, deceased, which have or shall come to the hands of Louis S. Levy, as executor, to be administered.

It will be observed that the complaint does not allege that the executor has in his hands any assets of the deceased, to be administered, and that the judgment prayed, is such as is entered in *an action at law*, against an executor or administrator.

If it can be said that the complaint contains a *third* cause of action, it must be on the theory that to constitute it, *the whole complaint*, exclusive of the prayer for judgment, is to be regarded as being the third count. It is evident that each acceptance is designed to be counted on as a separate and distinct cause of action against *Louis S. Levy, as survivor*. To make a cause of action against him, as executor, out of any thing in this complaint, it is necessary to include one or both of the two causes of action first stated. The pleader designed to include both; for he prays judgment for the amount of both acceptances.

The third cause of action is not *separately* stated.

If the third count is to be regarded as an action *at law*, then whether it embrace the two causes of action first above stated, or but one of them, it is bad in substance, *as an action at law*, as it shows a surviving partner *living*. If the third count be regarded as a claim to equitable relief, it does not allege any assets to be in the hands of the executor, and therefore fails to show any reason for invoking the exercise of the equitable powers of the court.

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In *Marshall v. De Groot*, (1 *Cai. Cas.*, 122), and in *Laurence v. Trustees of Lake & Watts Orphan Asylum*, (2 *Den.* 577), the fact of the insolvency of the survivors, and that the representative of the deceased partner had assets to be administered, were alleged. If the third cause of action is such as has heretofore been denominated legal, it is bad in substance. So many facts are stated as show that as executor, he is not liable at law. (*Grant v. Shurter*, 1 *Wend.* 148).

If it was intended to state a cause of action, which would entitle the plaintiff to *equitable relief*, I think it doubtful at least, whether enough is stated to confer jurisdiction. It is not alleged that the executor has any assets of his testator to be administered, and if he has none, a court of equity is incompetent to give any relief. There is nothing on which its powers can operate.

But if enough is stated to give jurisdiction to a court of equity, can such a course of action be joined with others against the defendant, as survivor?

They perhaps all arise out of transactions connected with the same subject of action. (*Code*, §§ 167, § 1). There is but one defendant;—in one sense—*each of them* affects him. But two of them affect him personally, or can be made to affect his estate. The third affects only the *estate* which he has or may receive as *executor* or *trustee*! And does not the word *trustee*, as employed in subdivision 7, of section 167, embrace executors and administrators, as well as those who are trustees, *eo nomine*? If it does, then it is obvious that it was not intended to allow causes of action seeking a judgment against a defendant *in personam*, to be united with others which might show a right to some relief against the defendant as a *trustee*, though the latter causes of action may be in some way connected with the same subject of action as the first.

The concluding sentence of section 167 prohibits joining causes of action belonging to subdivision one, with those belonging to subdivision seven, notwithstanding they may be connected with the same subject of action. I think the plaintiff attempts to unite causes of action which the Code does not allow to be united.

It is doubtful whether either count is good in substance. It

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is not very evident that either instrument is a *bill of exchange*. Each instrument is a request of the drawer, directed to Louis S. and Mark Levy, in their partnership name, that they will pay to the order of L. C. Opperman, at a time named, a sum stated, "*in merchandize*." The acceptance of this is alleged, and that the plaintiff delivered it to Opperman. That the plaintiff was forced to pay Opperman the amount, and thus became the holder. As these instruments are not bills of exchange, for the reason that they are not for the payment of money only, they are not negotiable by delivery so as to give a right of action to the holder. There is no allegation that Opperman sold or assigned them to the plaintiff. Not being bills of exchange, it may not be clear, that to enable Opperman to maintain an action against the acceptors, it would not be necessary for him to aver a consideration sufficient to uphold the contract. (*Smith v. Smith*, 2 *Johns. R.* 235. *Sexton v. Johnson*, 10 *ib.*, 418). No consideration for the defendant's acceptance is alleged. The instruments as described, do not import that there was any. If there is not enough stated to show a good cause of action against the defendant as *surviving* acceptor, nor to constitute a good cause of action *at law* against the defendant, as *executor*, nor to give a court of *equity* jurisdiction of an action against the defendant, as executor of Mark Levy, then the whole complaint is bad in substance.

Many of these views are stated rather to call attention to the difficulties suggested by them, than to express a definite opinion in conformity with such views.

I am of the opinion that the defendant is entitled to judgment on the ground that several causes of action have been improperly united. But the plaintiff may amend as he may be advised, in twenty days, on payment of the costs of the demurrer.

MECHANICS' AND TRADERS' SAVINGS INSTITUTION *v.*  
ROBERTS.

*Supreme Court, First District ; Special Term, March, 1855.*

FORECLOSURE SUIT.—RIGHTS OF INCUMBRANCEES MADE  
DEFENDANTS.

In an action for the foreclosure of a mortgage, under the statute, the court are not authorized to make a decree of sale, except for the purpose of satisfying the mortgage for the foreclosure of which the bill is filed, and the costs of suit.

A sale will not be ordered for the purpose of satisfying a junior mortgage, the mortgagee in which has been joined as defendant.

The affirmative relief which the court is authorized by section 274 of the Code, to grant to a defendant, is affirmative relief against the plaintiff only ; not against a co-defendant.

Motion for judgment on report of referee.

This was an action brought by the plaintiffs to foreclose a mortgage, made by Roberts. The Mechanics' Banking Association had been made defendants—they claiming to hold another mortgage, made by Roberts. By the referee's report, it appeared that there was a sum due upon the mortgage in suit, to the plaintiffs, and also another to the Mechanics' Banking Association.

The latter now moved for judgment and sale, and satisfaction of their mortgage, &c.

MITCHELL, J.—This was an action to foreclose a mortgage to the plaintiffs. The plaintiffs make no motion ; but the Mechanics' Banking Association, as defendant in the cause, moves for judgment on a report of a referee, showing that a certain amount is due to the plaintiffs, and a certain other amount due to the bank. There is nothing to show the order of priority of the mortgages, or that the bank's mortgage covers the same premises, and nothing to show any reason why the bank takes the conduct of the cause from the plaintiff ; or that the complaint or summons are so drawn that any relief can be given, except "the relief prayed for in the complaint."

It was allowable at one time to a plaintiff, to set out the rights of all the incumbrancers in his complaint, and then for the defendants to controvert with each other as to those rights; and while that rule prevailed, *Renwick v. Macomb* was decided. (*Hopk.* 177). But the rule was found productive of delay, and rules 132 and 136, of Chancery, established a different practice. The chancellor decided nothing contrary to this new practice in *Tower v. White*. (10 *Paige*, 395). The defendants then were allowed to set up in their answer, matter in contestation of the plaintiff's, (not of a co-defendant's,) rights, or matter necessary to show how the sale should be made, viz: in parcels, and in what order. An incumbrancer prior to the plaintiff, may set up his mortgage, and the sale be subject to that mortgage, or so as to satisfy it as well as the prior mortgage, as the effect is the same in both cases. But the Revised Statutes, which authorize a decree for the sale of mortgaged premises on a bill "filed for the foreclosure or satisfaction of a mortgage," only allow the sale to discharge "the amount due on the mortgage, and the costs of suit." (2 *Rev. Stats.* 191, § 15). "The mortgage," here means the mortgage for the foreclosure of which the bill is filed, and none other; and so far as the sale is concerned, there is no power in the court to go beyond that, as it derives its power to sell from the statute, and not from its general powers.

The judgment submitted, proposes a sale to satisfy the bank's mortgage only, and to make two other defendants liable for any deficiency. Nothing in the complaint or summons, can satisfy them that any such claim would be set up, and the complaint does not ask any such relief. It also shows that the defendant's mortgage is subsequent to the plaintiff's.

Section 274 of the Code is referred to as justifying this bold departure from long established practice. That section allows to a defendant affirmative relief; but is not that as against the plaintiff only? For it makes no provision for co-defendants to set up claims one against another; nor for notifying the adverse co-defendants of such claims. It also authorises the court to determine the ultimate rights of the parties on each side, as between themselves; but must not that be the rights as they arise from the claim set up by the plaintiff only? For

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as to all claims between co-defendants, neither knows what the other sets up against him.

If a later interpretation of this section is to be allowed in any case, so as to conform to the old practice in chancery, it cannot be to obtain a decree of sale, when the statute allows it only for the mortgage of the plaintiff.

The counsel for the bank would be allowed to withdraw his motion; but as he wished the court to decide against him, apparently that he might appeal, if its views were adverse to him, his motion for judgment is denied.

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WINTHROP *a.* MEYER.

*New York Common Pleas ; General Term, March, 1855.*

COMPETENCY OF WITNESS.—ASSIGNOR OF CHOSE IN ACTION.

The fact that an assignor of a *chose in action* has covenanted with the assignee that the full amount of the claim was due, does not render him incompetent to prove the claim in a suit by the assignee.

Appeal from a judgment of the Marine Court.

This was an action brought by Winthrop, as assignee of one Brown, to recover \$150, for services rendered to the defendants, Meyer and Loovis, by Brown, as broker, in procuring a loan.

On the trial the plaintiff put in evidence an assignment in writing, of the claim from Brown to himself. The assignment contained a covenant that the amount of \$150 was due and payable from the defendants.

The plaintiff then called Brown himself as a witness, to prove the rendering of the services alleged. The defendants objected to the competency of the witness, on the ground that under the covenant of the assignment, the suit must be considered to be prosecuted for his benefit. The objection was overruled, and the testimony admitted, subject to exception.



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Winthrop & Meyer.

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Judgment having been rendered for the plaintiff, the defendants appealed, both for error in the admission of Brown's testimony, and on the ground that the evidence was not sufficient to authorize the judgment.

*B. W. Kirkham*, for appellants.—The testimony of the witness, Brown, was inadmissible. He was the assignor of the claim in suit, and by his assignment covenanted that the amount of \$150, was due and payable by the defendants, which covenant brought him within the first clause of section 399 of the Code, as a person for whose immediate benefit the action was prosecuted.

*W. C. Hornfager*, for respondent.—The witness, Brown, was a competent witness, under the Code, as the action was not for his immediate benefit. And his testimony shows that he had no interest in the result of the action. (*Allen v. Franklin Insurance Company*, 9 *How. Pr. R.* 501. *Davison v. Minor*, *ib.* 524, and cases there cited).

DALY, J.—The fact that the assignor had covenanted that the amount of the claim was due, and that he might become liable upon his covenant, in the event of the plaintiff's failure to recover, did not render him the party for whose benefit the suit was brought. He had an interest in the result, which might affect his credibility, but which did not disqualify him from being a witness.

Upon the evidence, the judgment cannot be disturbed.

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Kiersted a. The People of the State of New York.

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KIERSTED a. THE PEOPLE OF THE STATE OF NEW YORK.

*Supreme Court, First District ; General Term, April, 1855.*

## JURISDICTION. SUITS AGAINST A STATE.

There is no power in any of the Courts of this State, to entertain a suit brought against the State itself except as authorized by statute.

Demurrer to complaint.

This action was brought by the plaintiff Kiersted on behalf of himself and such other of the persons interested in the controversy, as should come in, against the People of the State of New York, and the Rector, &c. of Trinity Church.

The allegations of the complaint, and the grounds of the demurrer, appear in the opinion of the Court.

*The Attorney General and others*, in support of the demurrer.

*Mr. Sullivan*, opposed.

MITCHELL, J.—The complaint contains substantially the following statements.

Anneke Jants being seized of the lands now held by Trinity Church, in 1663 made her will, and devised the same to her children, from one of whom the plaintiff derives his title as an heir at law. On March 27, 1667, the title to the lands was confirmed to the children and heirs of Anneke Jants by R. Nicolls, governor of the then colony of New York. The children and heirs entered and continued to have possession, until the Duke of York, exercising the royal prerogative of the crown of England, assumed possession of the lands during their absence from the island (now city) of New York; but such possession by him, was assumed only for the purpose of maintaining and preserving the rights of possession of the heirs, according to the laws of England then in force in the colony. On March 25, 1677, the governor leased the lands to one Senkness for twenty years. On 6 February, 1685, the

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Duke of York, proprietor of the then colony of New York, became king of England, and these lands were thereafter known as the king's farm. On August 19, 1697, Governor Fletcher (as governor under William III.) leased the lands to Trinity Church for seven years, describing them in the lease executed in the name of the king, "as our farm, known as the king's farm." On May 12, 1699, a colonial act was passed, annulling this and other leases as extravagant, and declaring that no governor should lease for a longer period than his own term of office, "the king's farm, and certain other specified lands, being for the benefit and accommodation of his majesty's governors, and commanders in chief for the time being." On May 9, 1702, Governor Cornbury leased the lands of Trinity Church so long as he should continue to be governor. The Church held over under the lease under Governor Lovelace and the successive governors, until the British evacuated the city of New York on November 25, 1783. In the reign of George II. in 1730, 1731, 1732, these lands were expressly recognized as the "king's farm," and were then reserved for the use of the governors and officers of the crown in the province; the Montgomery and Dongan charters reserving from the grant of lands to the city, "the king's farm."

The plaintiff alleges that there was an obligation legal and equitable on the successive kings of England to restore the possession to the heirs of his ancestor, and that this obligation has devolved on the State of New York. That the church pretends to hold under what purports to be a grant in fee from Lord Cornbury, made November 23, 1705, but that the grant is void and could not be made on account of the act of May 12, 1699.

The plaintiff demands that the State be required to demand possession of the lands from the church, and an account from the church of all moneys received by it since the year 1783, and that the State render possession of the lands to the said heirs by proper conveyances; and that *if the State make default*, the church be required to do the same things; and that a receiver be appointed and an injunction be granted.

For nearly eighty years, the people of the State of New York have been independent, and if liable to be sued in their

own courts, might have been sued within that time. Yet no other instance is known in which a suit was ever before commenced against them in their own tribunals, unless when they had specially authorized the suit, or they or their Attorney General were made parties in an equity suit with other defendants on account of some lien or claim held by the State *avowedly* subject to the prior claim of another. Then they were made co-defendants, not to defeat their claim, or to compel them to do justice, but to give them the opportunity (if they chose) to come in and protect their rights. No process issued against the people, but the complaint prayed for leave to serve the Attorney General with a copy of the bill, that he might answer or let the bill be taken as confessed. If such a suit as this had been sustainable, it is remarkable that it was not resorted to before. It was generally considered an axiom that the people could not be sued in their own tribunals, and the cases in which they were made parties to suits, or in which the king of England allowed an investigation of claims against property held by him to be prosecuted in certain courts, were deemed from their peculiarities as hardly exceptions to the rule. Blackstone says, "if any person has in point of property a just demand upon the king, he must petition him in his high court of chancery when Chancellor will administer right as a matter of *grace*, though not upon compulsion," and quotes Puffendorf, "that a subject hath no way to *oblige* his prince to give him his due, and if the prince gives him leave to enter an action against him in his own courts, it proceeds rather upon *natural equity* than upon the *municipal law*." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. (1 *Bl. Com.*, 243). Our State has no courts which administer law as a matter of grace and not of right, or which have a jurisdiction to persuade and not to compel those who appear before them.

The practice under the *petition de droit* or *monstrans de droit* was referred to by the plaintiff as applicable to this case, and it was insisted that the king held these lands subject to the right of the heirs and subject to have that right protected by means of one of those remedies; and that the lands devolved on the State, subject to the same rights, the same obligations

and remedies, and that these remedies were usually prosecuted before the chancellor in England and passed to this court, although in the form modified by the code.

Blackstone, in treating of the modes of redress for injuries proceeding from the crown, says expressly, "*no action will lie against the sovereign, for who shall command the king. Yet the law has furnished the subject with a decent and respectful mode of redress by informing the king of the matter in dispute.*" (3 *Bl. Com.*, 255). This is done by *petition de droit* or *monstrans de droit*. But to obtain either of these remedies, application must be made to the king, and in any such case there is no jurisdiction in any of the courts to proceed, until the king indorses his order in that particular case. By such act, the king (who formerly constituted the court) submits himself voluntarily in each case to the decision of the tribunal to which the case may be referred, whether to the barons of the exchequer as in the banker's case (5 *Mod.*, 29 and 14 *How.* State trials, 7) or to the king's bench if it be referred to them to examine the matter, or to the chancellor if the direction be simply *soit droit fait al partie*, (see *Vin. Abr. Prerog.* 2. Opinion of Iredell, J., in 2 *Dallas*, 444). Here that permission to the courts is wanting, and our legislature, which alone has power to surrender the custody and ownership of lands held by the people, and to give to the courts authority to take cognizance of a suit directly against the people, has conferred no such power on the State courts. They have not had any petition that "right be done" presented to them in this case, nor given to this court power to exercise jurisdiction over the people.

It is said the act of April 15, 1854, (ch. 280) gives this jurisdiction, but the demurrer in this case had been interposed by the people before that act was passed, and it only authorized that suit to have a preference on the calendar, and gave a like preference to any other suits which the Attorney General might deem it expedient to prosecute to enforce the *rights of the State* against this plaintiff or the church or other claimants. It cut off no defence that the State might make to this suit, and one of these defences is that the State cannot be thus sued.

There were reasons for allowing judicial tribunals to pass on

the right of the king to property held by him and claimed by another which would not apply to the State. He held such property as an *individual*. At one time his individual property must have formed the greatest part of his resources, and his supplies from Parliament were comparatively small and given seldom and grudgingly. This individual property was added to by attainders, forfeitures and escheats, whether for crimes or default of heirs of former owners or other causes. His title to these new acquisitions was found by inquisition, where the true owners would generally have no opportunity of being heard, and the king might thus frequently become the possessor of lands as forfeited to him by the fault or misfortune of one who had had no title or only a defeasible one and the true title was in another.

When forfeitures were frequent it must have been essential to the safety of the crown that it should allow "right to be done" to such parties, although the crown by its officers had laid its hands on their lands. But if the title to those lands or other property held by the king had passed to the State in England, so that he ceased to hold them and Parliament had the control over them, can it be imagined that, after that, the *petition de droit* would be applicable, and that the English Parliament, or the English people could be sued in their own courts on the king's order, or even without his consent? If the English legislature and the English people could not be sued in such case, neither can the people of our own State. And if, as is assumed, the people can be sued whenever the king could be proceeded against on *petition de droit* or *monstrans de droit*, then every State (where the common law prevails) can be sued on its obligations, when it has pledged certain revenues to meet them; for it was held in the Banker's case that the king could be thus proceeded against in such a case (see above). Such a doctrine would be equally new and startling. Those who have claims upon the State rely upon the public faith; and self-interest and a sense of honor and of right have been yet generally found sufficient means of securing justice to claimants against the State.

A brief reference to parts of the history of our own law will show how tenacious the States have been of their rights on this

subject. The constitution of the United States declared that the judicial power of the United States should extend among other matters to controversies between two or more States, and between a State and citizens of another State (*Art 3, § 2*). Under this power, suits were brought in the United States Court of citizens of another State, against the State of Maryland in 1791, (2 *Dallas*, 401) and by another against the State of New York (*ib.*) and by another against the State of Georgia in 1793 (2 *ib.* 419) and by another against the State of Virginia (3 *ib.* 320). Georgia and Virginia protested against the exercise of this jurisdiction, and Georgia refused to appear in Court except to make its protest. Judge Iredell insisted in an able and learned opinion that the Court had no jurisdiction in such an action, which was on a contract. Chief Justice Jay with Justices Blair, Wilson and Cushing, held that the words of the constitution clearly conferred the jurisdiction, and they ordered that unless the State of Georgia should appear by a certain day or show cause to the contrary, judgment should pass by default;—but Chief Justice Jay dreading the consequences of the decision, said he was far from being prepared to say that an individual may sue a State on bills of credit *issued before the constitution was established*. He probably would have been as little prepared to allow the suit on a claim to lands when the right had also existed before the constitution was established. This decision was necessary under the words of the constitution; it was made in 1793, and (as we are told in 3 *Dallas*, 378) it produced the proposition in congress for amending that article of the constitution, and it was promptly amended by the requisite number of States, so that “it should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.” The people thus declared their sovereign will that while a State might sue, it should not be sued by an individual in the United States Court, the only courts which ever had any express authority to entertain such a suit. And the Supreme Court of the United States so readily assented to this expression of the will of the States, that they unanimously held that it applied even to suits then pending, and refused to

proceed further in any such suits, (*Hollingsworth v. State of Virginia*, 3 *Dallas*, 382).

In our State no general power has ever been given to any court to entertain a suit against the State, but the legislature has, by special legislation, pointed out in the cases and manner in which it would allow the title to property held by it to be contested, and as it has thus given the permission in a few special cases only, it shows that it was not intended that the permission should extend to other cases. The Revised Statutes (1 *Rev. Stats.*, 718, § 2), declare that all escheated lands, when held by the State or its grantors, shall be subject to the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended; and the Court of Chancery shall have power to direct the *Attorney General* to convey such lands to the parties equitably entitled thereto, according to their respective rights, or to such new trustee as may be appointed by such Court. The Revisers give the reason for this law; they say (3 *R. S.*, 563), "By the common law, lands held in trust, if they escheat to the king, are held by him, *free from the trust*. The same doctrine would probably be applied to the people of this State. This severe rule has in part been remedied in England by the act of 47, *Geo. 3*, c. 29, and it is presumed that the legislature of this State *will be* equally ready to amend the law in this particular." So even if these lands had escheated for default of heirs of the trustee, the people would have held them discharged of the trust; and now where they amend the law in that respect they confine the amendment to the case of escheated lands, and make the remedy to be not in suit against the State, but in the chancellor's directing the *Attorney General* to convey the lands to the parties equitably entitled.

So the Revised Statutes also allow the same proceedings to be had against the State for the partition of lands held by the State, and by individuals in common in the same manner as in suit against individuals, (2 *Rev. Stats.*, 331 § 99).

So it required an express Statute to subject the people to costs, or to make the Statute of limitations a bar to their claims (see 2 *Rev. Stats.*, 552, § 13 or 292, § 1). The provision for costs to be paid by the people, is only when the people are



plaintiffs, not when the people are defendants; showing that the latter was a case not supposed or supposable, except when it was specially allowed.

The direct authorities on the subject are few, because it is seldom that the question can arise. In *Delafield v. the State of Illinois*, on appeal in the Court for the Correction of Errors, (2 *Hill*, 159) the counsel for the appellant had contended that the State could not sue in a State court; but Bronson, Chief Justice, successfully controverted this position, and in the course of his opinion (p. 169) said, "When a State is made *defendant* the *State courts cannot* exercise jurisdiction." In the same case (8 *Paige* 533), the chancellor had said, "The State cannot indeed be sued by any private individual or corporation." It therefore may be impossible to coerce a payment by any legal process, unless the stock should come into the possession of a sovereign state," &c. The Chancellor, in a subsequent case, explained with his usual clearness, the principle on which a State ever is made a defendant in a State court. In *Garr v. Bright* (1 *Barb. Ch. R.* 163), he says, "It is true this court has not the power absolutely to compel a sovereign State to perform a decree which may be made against such State. And if the State of Indiana should be made a party defendant in this suit, it would not be with *any expectation of compelling it* to transfer to the complainant the stock standing in its name upon the books of the Apalachicola Land Company. But it would be to enable the State to appear and protect its right, if it has any, as one of the *cestuis que trust*, in the proceeds of the land of that association, which lands are vested in some of the *other defendants* in this suit as trustees for the stockholders, so that such trustees may be protected from the risk and expense of a double litigation with those who have conflicting claims upon the trust fund. And upon the same principle the Attorney General would be made a party to the suit, if the people of this State claimed an interest as one of the *cestuis que trust*, and the complainant was asking similiar relief against the trustees as the claimant of the same interest; although *the State itself cannot be sued in its own Courts directly*. It is also the practice to make the Attorney General a party to a foreclosure suit, when the

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 Quintard a. Secor.
 

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people of this State have a subsequent lien upon the mortgaged premises, by judgment or otherwise, so as to give to the purchaser under the decree of foreclosure, a perfect title to the premises discharged of the lien of the State, and when any other State or government has a similar lien, I see no valid objection to making it a party defendant for the same purpose."

Here the complaint shows that the king leased these lands as the king's own lands, and reserved rent on them for the use of the Governors for the time being, and that the lands were known as the King's farm, and as such leased to the church;—and asks for direct relief against the people—that the people be compelled to demand possession of the lands from the church, and an account of the rents, and to render to the plaintiff, and other heirs, the possession of the premises; and only asks relief against the church if the People make default. The action is therefore directly against the people, and only against the church if the people make default. The people do not make default. There is thus no course of action against the church, as that sought against it is only secondary to that sought against the State.

The nature of the relief sought is extraordinary, no trust estate being alleged and the application to a Court, and not to the Legislature to require the State to act, is still more extraordinary.

Judgment should be for the defendants with costs.

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 QUINTARD a. SECOR.

*New York Common Pleas ; Special Term, April, 1855.*

#### ADMISSION OF PART OF PLAINTIFF'S CLAIM.—SATISFACTION.

The power of the court to order the satisfaction of a part of plaintiff's claim admitted to be just, under § 244 of the Code, is not confined to cases in which one, or more, of several distinct items of claim is admitted in the precise extent in which it is set up; but such an order may be made where a part of a sum claimed, is admitted to be due.

A concession in the answer that not more than a specified sum was due to the plaintiff,—*Held*, an admission that that sum was due, and so an admission of part of plaintiff's claim.

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Quintard & Secor.

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Where defendant by answer admits a part of plaintiff's claim to be just, an order requiring him to satisfy such part will be made, in the Common Pleas, notwithstanding that the defendant has, even before answering, made an offer in writing to allow the plaintiff to take judgment for the sum admitted to be due.

Motion that defendants be required to satisfy a part of plaintiffs' claim admitted by his answer to be just.

The facts upon which the motion was based, appear sufficiently in the opinion of the court.

*Benedict, Scoville & Benedict* for the motion.

*Mr. McMahon* opposed.

WOODEUFF, J.—The plaintiffs herein allege in their complaint that they have rendered services and furnished materials, use of tools, machinery, &c., to the defendants, which are reasonably worth the sum of \$651.15, for which sum the defendants are indebted to them, with interest from the 28th day of September, 1854.

After the service of the summons and complaint, and before answering, the defendants served an offer to allow judgment to be entered in the plaintiff's favor for the sum of \$572.52, with interest from the 28th day of September, 1854, with costs.

The offer not being accepted, the defendants put in an answer admitting that the services were rendered, and the materials, use of tools, machinery, &c., were furnished, but denying that the services were reasonably worth the sum of \$651.15, and on the other hand alleging that they were worth only the sum of \$572.52, and that there is no other or greater sum due from the defendants to the plaintiffs than the said sum of \$572.15, with interest thereon from the 28th day of September, 1854.

Upon the coming in of the answer, the plaintiffs have applied to the court, under § 244 of the Code of Procedure, for an order that the defendant "satisfy that part of the plaintiff's claim which he admits to be due, being the sum of \$572.52, with interest from September 28, 1854. This motion is opposed by the defendants upon three grounds:—

1. That the case is not such an one as is contemplated by the section referred to.

2. That the admission is not of that specific character which precludes inquiry, being only a concession that "not more than the sum named is due." (Citing *Dolan v. Petty*, 4 *Sandf. S. C. R.*, 673).

3. That where the defendant has made an offer to allow judgment to be taken for the sum sought, the court should not make an order for its payment. (Citing *Smith v. Olesen*, *Id.* 711).

I. Under this first objection, it is insisted that the language of the Code, "when the answer of the defendant admits *part of the plaintiff's* claim to be just," applies only to a case in which the complaint of the plaintiff proceeds upon more than one cause of action or more than *one item* of claim, one or more of which is admitted in the precise extent in which it is set up by the plaintiff. As for example, when the action is upon two notes or bonds, and one of them is admitted to be due and payable, or when the action is for certain specified goods, and the defendant admits the purchase of certain of the goods at the very price claimed.

I cannot yield to this view of the construction of the statute. Its adoption necessarily results in excluding it from application to any case, in which the plaintiff's cause of action, as set up, is single and entire; and nothing in its terms nor (in my judgment) in its spirit, warrants any such restriction. The terms "part of the plaintiff's claim," are at least equally well suited to a portion of one claim, as they are to one of two claims, and I think better, and had the legislature intended any such restriction, it would have been quite easy and much more explicit to say, "when the answer admits any one or more items in the plaintiff's claim or claims to be just," &c.

This, however, is not the only ground of my opinion of the meaning of the legislature. By section 142 of the Code, the requisites of a complaint are given, and it must contain three things which are there defined with particularity. 1st. The *title* of the *cause*. 2d. The statement of the *facts* constituting the *cause of action*, and, 3d. A *demand* of the *relief* to which the plaintiff supposes himself entitled, and if the *recovery of money* be demanded, the amount thereof shall be stated.

Now it is obvious that the first two of these requisites contain

no "claim" whatever; the third, and the third only, contains the plaintiff's claim, and that alone declares the amount of money claimed. All else in the complaint is mere allegation of facts lying at the foundation of the plaintiff's *title* to relief, but his *claim* is his demand of that relief. If then he demands a recovery of one hundred dollars, and the defendant admits that he is entitled to recover fifty dollars, he "admits a part of his claim to be just" whether the facts stated, and out of which the plaintiff's title to recover arises, consist of one note or two.

Again, I perceive no reason why such a discrimination should be made. If a defendant admits that half the sum specified in one note is due and payable, it is no less just that he should pay that half, than that he should pay one of two notes when the plaintiff claims both. A legislature would exhibit a singular inconsistency in making such a distinction. For example:—a defendant gives to one man a single note for \$1000. To another he gives two notes for \$500 each. Being sued by both, he admits that \$500 and interest is due on the first note, and in the other suit, he admits that one note and the interest thereon is due, and that only. Is there any reason or equity in furnishing this provisional remedy to one plaintiff, and withholding it from the other? I can find none.

We may properly assume that both parties are acting in good faith, each supposing that he is only insisting upon his legal rights; but conceding this, there is no reason that either should retain in his hands money to which he admits that the other is entitled. The spirit and the scope, and in general the effect of the Code is to confine litigation to the real matters in dispute,—to bring parties before the court upon the mere merits of their controversies, and this provision is plainly a part of the scheme, and to me it seems a most just and equitable one.

As on the one hand the defendant has it in his power to tender the sum admitted to be due, or to offer to submit to judgment, and so put the plaintiff to his election to litigate further or not, at the peril of costs if he do not succeed; so when the defendant admits a sum to be due, the plaintiff is

permitted to require its payment, that the real matter of contest, and that only, may be before the court.

II. But it is urged that a concession that "not more than a sum named is due," is not an admission that a *part* of the plaintiff's claim is just, and such appears to have been the opinion of the court in the case cited. (*Dolan v. Petty*, 4 *Sandf.*, 673).

Without the sanction of such a decision, I should hardly have deemed this argument entitled to grave consideration. Suppose the case brought to trial, and the plaintiff rested his case upon the pleadings, would the court hesitate to order judgment for the plaintiff to the extent of the sum so named? Nay, more, would they permit the defendant to call a single witness to prove that the plaintiff was entitled to less?

Is it possible that when a defendant says, "I admit that \$572.52 is due, and deny that the goods were worth more," he in legal effect does anything more than when he says, "I aver that the goods were worth only \$572.52, and deny that any other or greater sum is due."?

The rule of pleading, and the construction of pleadings have, it seems to me, undergone strange transformations, if these questions must not be answered in the negative.

The cases of *Roberts v. Law*, (4 *Sandf.*, 642), and *Dolan v. Petty* (*Id.*, 678), may on this subject be usefully contrasted.

III. It is claimed that inasmuch as the defendant has offered to suffer judgment to be entered against him for the sum admitted, this provisional remedy should be withheld, and *Smith v. Olssen* is cited as above stated.

The proposition seems to me to amount to this. A defendant may say to a plaintiff, I admit that the sum that I name is due, I do not deny that I am able to satisfy it at any moment, but if you will not consent to take judgment for that amount, I will retain the money, and you shall not have the benefit of the provisional remedy to which plaintiffs are in general entitled. If you will not give up all of your claim that I do not choose to concede, you shall have nothing until the end of our litigation, and if it prove that I have then expended the amount in an unjust litigation, yours be the loss, should my means of payment be then exhausted.

It seems to me that this is annexing a condition to the granting of this motion which the legislature did not contemplate.

A defendant by making such an offer has done nothing meritorious, when he admits its justice. Nor does such an offer place the plaintiff in any better situation than the very admission in the answer does, for when such an admission is found in the answer, the plaintiff may *take judgment for the sum admitted*, if he pleases to do so, *whether the defendant has made such an offer or not*.

If such an offer is made, he may take judgment because such offer is made.

If such an admission is found in the answer, he may have judgment because it is so admitted.

To say that because the defendant has offered to submit to judgment for a part of the claim, the plaintiff shall not have an order to satisfy that part, which is admitted in the answer to be just, is in effect to say that he shall not have such order, because its justice is twice admitted.

I fully concur in what has been said in other courts and in this court, (see *Merritt v. Thompson*,\* Jan. General Term, 1855), of the caution to be observed in administering this remedy. It may be that an order for the payment of the money, will result in an application for an attachment in case of disobedience, and, if a defendant be found in contempt, an imprisonment be called for.

I do not for a moment suppose, (as I have on a former occasion suggested), that the legislature intended by the provision under consideration, to abrogate the laws abolishing imprisonment for debt. Neither the language, nor my view of the design of the legislature indicates such an intention. Unquestionably the resort to this summary mode of compelling the payment of the sum admitted to be due is controlled by a just discretion given to the court. And if *inability* to pay is shown by the defendant, it should prevail either to induce the court in the first instance to withhold the order, or to excuse the apparent contempt of the defendant in disobeying it. See *Meyers v. Trimble*,† April General Term, 1855.

But where, as in the present case, the parties stand before

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\* *Ante*, 223.† *Post*, 339.

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Meyers v. Trimble.

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me, the plaintiff claiming \$651.15, and the defendant admitting that \$572.52 is justly due, and no reason whatever is given for not tendering or paying the sum so admitted except that the plaintiff will not accept a judgment therefor in full satisfaction, I feel constrained to grant the order.

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## MEYERS v. TRIMBLE.

*New York Common Pleas ; General Term, April, 1855.*

ADMISSION OF PART OF PLAINTIFF'S CLAIM.—SATISFACTION.—  
ATTACHMENT.

When an order is made under section 244 of the Code, requiring a defendant who admits a part of the plaintiff's claim to be just, to satisfy that part, and such order is served on the defendant personally and he refuses to obey it, the defendant may be attached for such disobedience, and if he does not show an excuse for it, may be punished as for a contempt.

*It seems* that inability to pay the sum admitted to be due, would be a sufficient excuse for the apparent contumacy.

Appeal from the order granting an attachment, made in this cause at special term in February, 1855, as reported *ante*, 220.

*Meeks & Waite* for appellant.

*A. Matthews* for respondent.

BY THE COURT.—WOODEUFF, J.—The order appealed from herein is not submitted with the papers on this appeal, but only a certificate by one of the Judges at Special Term, that the questions arising on the motion there, are of sufficient importance and doubt to render a review by the General Term proper.

It is, however, stated in the points submitted by the respondent, that the order in question was made under the following circumstances and is of the purport following. The plaintiff having brought his action upon a promissory note, the defendants by their answer allege a counter claim by way off set off to a part of the plaintiff's demand, and admit the residue. Thereupon an order was made, directing the defendants to



satisfy that part of the plaintiff's claim which was so admitted in pursuance of section 244 of the Code.

This order being served, the defendants refused to comply therewith, and upon a motion for an attachment for the disobedience of that order, a further order was made that an attachment issue to bring the defendants into court to answer for their apparent contempt in disobeying the former order.

From the order that an attachment issue (as stated in the respondent's points) the present appeal is taken.

No points are submitted by the appellant, and we are not therefore apprised of the grounds of his objection to the order. All that appeared before the court, when the order appealed from was made, was that the order for the payment of the sum admitted to be due, was served upon each of the defendants personally, and that they refused to obey it. No excuse was offered for such disobedience; the propriety of the original order is not open to question on this appeal; and the only question that occurs to me is this: Did the legislature, when they provided that such an order might be enforced by the court as it enforces a provisional remedy, mean that the court might issue an attachment against the persons of the defendants, and require them to answer for the apparent contempt, and if upon such appearance the apparent contempt was neither disproved nor excused, may the court proceed to fine and imprison as in other cases of contempt?

I have heretofore in *Merritt v. Thompson*,\* in this court, at the January General Term, (1855) and in a recent case at the April Special Term, *Quintard v. Secor*,† expressed my view at some length regarding the consistency of the power given to the court by the section of the Code under consideration, with our statutes abolishing imprisonment for debt. Although if we were impelled by our views of the proper construction of this section to say that it provides for the imprisonment of a debtor, who, admitting that he owes money, is in fact unable to pay it, we should be bound to add that the legislature who had abolished imprisonment for debt, were entirely competent to restore it, in such cases, and with such limitations and qual-

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\* *Ante*, 223.† *Ante*, 393.

ifications as they thought proper; yet, on the other hand, we ought to give a construction to the section in harmony with the general course of legislation in this state for more than thirty years, and with the spirit which still characterizes our laws, and especially with a cautious regard for the liberty of the citizen, if such construction will satisfy the requirements of the section under consideration. And in this view I have suggested in the above cases, that if it appear that the debtor is unable to pay the sum ordered to be paid, that may be deemed a sufficient excuse when he appears to answer for apparent contumacy.

Courts will not adjudge a defendant in contempt for not doing an impossibility, nor for not doing what it is not in his power to do, unless he has voluntarily disabled himself to do the act, and the creation of the disability was itself a contumacious act. There is therefore nothing in the objection that the order appealed from is in conflict with our non-imprisonment laws, or the general design of the legislature to protect an honest but insolvent debtor from being restrained of his personal liberty.

The question, however, still remains whether by the terms "may enforce the order as the court enforces a provisional remedy" was meant that the court might punish disobedience as a contempt. There appears to me no room to give it any other meaning.

How do the courts enforce a "provisional remedy?" Under the Code, provisional remedies are described in five chapters. 1st. "Arrest and Bail." This remedy when granted, enforces itself as against the defendant. The very order of arrest goes into the hands of a ministerial officer for immediate execution. It requires no supplemental proceedings to enforce it, unless the sheriff refuses to return the writ or *mandate*, and if he do, he may clearly be ordered to make such return and be attached for a *contempt* in disobeying the order. 2d. "Claim and Delivery." To this the same remark in substance applies, and an attachment may be granted to compel the sheriff to perform his duty. 3d. "Injunction." In respect to which the appropriate mode of compelling obedience is by attachment for a contempt in disregarding it. 4th. "Attachment" against property of foreign corporations, non-resident or absconding

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debtors. The remarks made regarding arrest and bail, are applicable to this also. The execution of the attachment by the sheriff enforces this remedy, unless the sheriff by some neglect of his own duty, subjects himself to a proceeding for contempt. 5th. "Appointment of Receivers." "Power to order the delivery of money or property in the defendant's possession, to the party claiming it, or to bring it into court," in respect to both of which the power of the court to enforce its order by process for a contempt, is unquestionable, and in respect to the order for the delivery of property, the terms are explicit that the court may not only punish disobedience as a contempt, but may direct the sheriff to take the money or property, and deposit or deliver it in conformity with the original direction.

Now, in respect to all these remedies, the well-known power of the court to punish a disobedience of its orders as a contempt, is an important mode of making them effectual, and in some of them the remedy itself would be wholly ineffectual and inoperative without such power, and this power is fully given and regulated by the Revised Statutes, and is preserved in force by section 471 of the Code.

I do not therefore hesitate in concluding that the language above referred to, means that the court may compel obedience to its order in the mode pursued in the present case. Indeed, had the provision in question stopped with a warrant to the court to order the defendant to satisfy the part of the claim admitted, and had not prescribed the mode of enforcing obedience, it would have been no idle claim that the provisions of the Revised Statutes (2 *Rev. Stats.*, 534 and 536, § 1 and § 4, § 5 and onward) would have been distinctly applicable to a case of disobedience to such an order. On the contrary, the remedy by precept or attachment for a contempt would seem not only authorized, but in all respects appropriate.

In my opinion the order should be affirmed.

Order affirmed.

## KETELTAS v. MYERS.

*New York Common Pleas ; General Term, June, 1854.**Again, March, 1855.*

## PLEADING.—COMPLAINT ON PROMISSORY NOTE.

*It seems* that where a decision of the general term affirming a decision at special term sustaining a demurrer is final, no leave to plead over being given, appeal should be taken directly from that decision as a judgment.

If, however, it be necessary as matter of form to wait until judgment is perfected in the action, and then to appeal from that judgment to the general term, before going to the Court of Appeals, the court will not as a general rule, permit appellant to argue on the second appeal the same questions which were discussed upon the first.

A complaint upon a promissory note which does not aver that the amount claimed therein is due *from the adverse party*, and that it is due *on the note*, is not conformable to the requisites stated in § 162 of the Code. It is not sufficient to aver that the amount is due to the plaintiff.

If the complaint is not drawn under that section, the pleader must aver a breach so as to show the default of the defendant.

I. *June, 1854.* Appeal from judgment at special term, sustaining demurrer to complaint.

The complaint in this action averred that the defendant "for value received, made and delivered to the plaintiff his promissory note, payable to the order of plaintiff and indorsed by him;" and set out a copy of the note which was for the sum of two hundred and four dollars, sixty-seven cents. The complaint then concluded with the following allegation, succeeded by the usual demand of judgment.

"That there is due and owing the said plaintiff the said sum of two hundred and four dollars, sixty-seven cents with interest thereon," &c.

The defendant demurred to the complaint, for want of statement of facts sufficient to constitute a cause of action.

On the hearing of the demurrer at special term, judgment was ordered, in December, 1853, for the defendant, with leave to the plaintiff to amend within three months; the following opinion being rendered.

DALY, J.—The plaintiff avers that the note was made and delivered to him by the defendant. This is sufficient to show

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title in the plaintiff, and a formal allegation that he is the owner or holder is unnecessary. There is no averment of a transfer of the note by indorsement. The complaint states that the plaintiff indorsed the note without setting forth anything further. This is a statement of an indorsement in blank without alleging a delivery, which amounts to nothing. The complaint is, however, in other respects defective, and the demurrer is well taken. The plaintiff was at liberty, the note being an instrument for the payment of money, to declare in the manner pointed out by the Code or in any other manner, if he sets forth sufficient to show that he had a good cause of action. If he frames his complaint in conformity to the Code, he must, in addition to giving a copy of the note, allege that there is due from the defendant on the note a certain sum, specifying it, or if he adopts a different mode of declaring, it must appear not only that the defendant entered into the contract, but that it remained unperformed when the action was brought. He must allege a breach, either in the old form that the defendant neglected and refused to pay the note; (1 *Chitty*, 365, 375), or at least that it remains due and unpaid (3 *Marle. & S.*, 150). After alleging the making of the note by the defendant, and giving a copy of it, the complaint states that there is due and owing to the plaintiff *the said sum* of two hundred and four dollars and sixty-seven cents, the amount which it appears by the note as set forth, the defendant promised to pay. The words "the said sum" do not, because the amount is the same with that stated in the body of the note, necessarily denote that the note remains due and unpaid, or that that sum is due and owing upon the note. For all that appears in the complaint, it might refer to some other sum due and owing to the plaintiff. There might be another note for the same amount to which it would be as applicable as the note declared on. In the present liberal mode of regarding pleading, it is not usual to insist upon great technical nicety in setting out a cause of action, but reasonable precision of language is essential under any form of pleading, and I should feel unwilling to admit by upholding the present complaint, that a complaint so framed would be a proper precedent hereafter. It must therefore be amended by averring either in accordance with the Code, that the amount specified is due and owing by

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the defendant on the note, or else by inserting a general averment that the note remains due and unpaid.

From the judgment of the special term, the plaintiff appealed to the general term.

*C. B. Smith* for appellant.

*C. N. Potter* for respondent.

BY THE COURT.—WOODRUFF, J.—The object of the Code of Procedure was to simplify the rules of pleading by practically dispensing with technical rules and forms, and useless verbiage, and to introduce a system in which it should be only necessary to state the substantial matter of complaint. But unless it has been done by section 162, the Code nowhere dispenses with a statement of the facts which, upon the trial it is necessary for a plaintiff to prove, in order to make out a cause of action. Liberality and freedom, as well as brevity and conciseness, are allowable; but looseness and uncertainty are nowhere sanctioned.

*First*, then, it was necessary before the Code, in declaring on a promissory note against the maker, that the plaintiff should aver—the making of the note, the promise contained therein or implied thereby, the facts which constitute the plaintiff the holder, promisee, or person entitled to enforce the promise—and the breach of promise contained in or implied from the making of the note. These were all matters of substance, and indispensable to a good declaration, and such matters are not dispensed with by the Code except so far as section 162 has introduced a new practice.

Tested by these rules, the complaint in this case appears to me defective. It consists of an averment that the defendant made and delivered to the plaintiff the promissory note, of which a copy is set forth, and that it is payable to the order of the plaintiff, and indorsed by him; “that there is due and owing the said plaintiff the said sum of \$204.67, with interest from the second day of September.” The making by the defendant is averred. The delivery to the plaintiff, payable to his order, is doubtless a sufficient averment of facts, constituting the plaintiff the holder, and entitling him to enforce the cause of action, if any. In conformity with modern decisions,

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it may be said that an averment of the making and delivery of the writing, and giving its very terms, to wit: "I promise to pay," &c., is a sufficient averment of the promise by the defendant, though it was formerly held otherwise. (See *Bac. Abr. Tit. Assumpsit, F.*; *Morris v. Norfolk*, 1 *Taunt.*, 217; *Mountford v. Horton*, 2 *New R.*, 62;) and cases cited in the note. The only remaining requisite is the allegation of the breach of promise. This need not be averred in any particular form, but it must be in such form that it charges default of performance of the promise, and charges that default upon the defendant; and in such wise that it shows default in the defendant as the ground upon which damages are claimed, and that it may be met by a distinct counter allegation, so as to create a material issue; as by an averment that the defendant hath not paid the sum mentioned in said note. And in general as stated by Chitty, (1 *Chit. Pl.*, 325), the breach should be assigned in the words of the contract, though it is sufficient to assign the breach in words containing the sense and substance of the contract. The action is not for the making of the promise, but for the breach of it; and if that be not avowed, it does not appear that the plaintiff has any cause of complaint. In an action for the breach of a contract the rule is the same. Now in this case, it is not averred that the defendant has not paid, or has not performed his promise, in any form; nor even that the money mentioned in the note has not been paid, or that it remains unpaid. The pleader says that the sum is due and owing to the plaintiff. This is the statement of a mere legal inference from a breach which is not averred at all. But even this is not charged upon the defendant. He does not aver that the said sum is due and owing to the plaintiff from the defendant. To warrant the legal inference that the money is due and owing, it is necessary to aver the promise and the breach of it by the defendant, for without both of these, no such inference arises. The plaintiff's counsel insisted on the argument that the possession of the note and its production was sufficient to raise the implication that it was not paid. That may be conceded, but that only goes to the mode in which the non-payment is to be proved, and not to show that an averment of non-payment is unnecessary. A plaintiff must aver the facts essential to his right of

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recovery; the mode of proving those facts is a different matter. I think the plaintiff here has failed to put the defendant in default by an averment of any breach of contract, or any facts amounting to such a breach, and, therefore, that the demurrer to the complaint was well taken, unless his complaint can be sustained by section 162 of the Code.

*Second.* By section 162 it is provided that in an action founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specific sum, which he claims. I agree with the opinion given at special term, that if a plaintiff seeks to avail himself of the privilege given by this section, he must conform to its requirements; and he cannot be allowed to say that the legislature have relaxed or dispensed with the former mode of declaring on a written instrument and given a substitute, and now the court may dispense with compliance with the rules required in the substitute itself. The sum claimed is neither alleged to be due on the note, nor to be due from the defendant.

The defects in this complaint are easily amended. The court would not, I think, have hesitated to allow an amendment even after this demurrer was interposed, without costs. The court have no disposition to withhold indulgence, or encourage objections that are trifling or unsubstantial; but there must be some rules of pleading and practice, and if so, they must be maintained. I think the order sustaining the demurrer and ordering judgment for the defendant should be affirmed.

Order affirmed.

II. *March*, 1855.—The plaintiff having declined to accept the leave of amendment granted him, judgment was entered against him in the action, at special term, December 9, 1854. From this judgment he again appealed to the general term.

By THE COURT.—INGRAHAM, F. J.—The present case comes before us on an appeal from a judgment entered on a decision made upon a demurrer to the complaint.

The case was first heard at special term, and the demurrer



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was sustained. From the order there made the plaintiff appealed to the general term, under section 349 of the Code, subdivision 2, where the order below was affirmed. The plaintiff declined to accept the leave granted to amend his complaint, and judgment was thereupon entered up for the defendant. The plaintiff has again appealed to the general term from the judgment rendered.

I. It may be doubted whether there was any propriety in this appeal. When the case was heard and decided at special term, the plaintiff was allowed three months to amend his complaint. That was in December, 1853. He refused so to do, and in February, 1854, the general term affirmed the order appealed from, but no further time was allowed to amend.

In *Reynolds v. Freeman*, (4 *Sand. S. C. R.*, 702), it was held that in cases where no right to amend or plead over is given, but the judgment is final, the appeal should be from that decision as a judgment. The time for amending had expired long before the decision and probably before the case was argued at general term, and as the plaintiff even after that decision declined to amend his complaint, the principle of the case cited may be applied here, so as to require the appeal to be from that judgment which followed the decision of the general term.

II. But whether or not an appeal after the entry of judgment is necessary to be made to the general term in such cases before going to the Court of Appeals, we do not permit an appellant to argue a second time on appealing from the judgment the same questions which were argued previously on an appeal from an order sustaining a demurrer. If it is thought necessary that an appeal should be made from a judgment rendered on demurrer in favor of a party demurring, after it has once been reviewed on the order made at special term, sustaining the demurrer, the decision so made in the first instance at general term, and the opinion therein delivered, must be taken as the decision and opinion of the court when the same question comes again before the general term on the second appeal, and no new argument will be allowed.

In the present case the rule would have been enforced, but the counsel for the appellant suggested that recent decisions of

the Court of Appeals might be applicable to this case; and with a view of examining these cases, a further argument was permitted.

III. My brethren have both delivered opinions in favor of the defendant on this demurrer, and when the case was before them on appeal from the order originally made, they concurred in the decision then made. For the reasons of that decision I refer to their opinions annexed to the papers now submitted.

It is very clear that the complaint cannot be said to come within the provisions of § 162 of the Code, because it does not state that the money claimed is due *from the defendant*, nor that it is due *on the note*, a copy of which is to be inserted in the complaint. The words of that section are, "and to state that there is due to him (the plaintiff) *thereon* from the adverse party," &c.

The words of the complaint are, that there is due and owing to the plaintiff the said sum, &c., not averring from whom it is due, or on what the money is claimed.

IV. Whether the pleading is good or not must therefore be decided by the rules generally applicable to pleadings, irrespective of the mode prescribed in § 162.

The objections made to this complaint were—

1. That the plaintiff does not aver himself to be the holder or owner of the note.
2. That it does not appear and is not stated that any part thereof remains unpaid.
3. That it is not stated that any sum is due or owing upon it.
4. That it appears the note has been indorsed by the plaintiff, and that the property of the note therefore is not in him.

In the opinions heretofore delivered, both of my brethren agreed in holding that no breach was averred in the complaint, and that it was therefore defective.

It is not now pretended that there is any formal breach contained in the complaint. The averment that the said sum of money (being the same in amount as the maker of the note promises to pay) is due to the plaintiff cannot be considered as either averring that the money secured by the note is due

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or that the maker of the note is the party who owes the plaintiff.

Suppose the clause had been, "that a sum of money equal to the amount due upon the note was now due and owing," no one would pretend that to be an averment that the note was still unpaid, or that the maker of the note was indebted thereon to the plaintiff; and yet the meaning of the clause in the complaint does not vary materially from the form above given.

It is said, however, no express breach is necessary. This is conceded if the complaint had been drawn under § 162, but even that form has an averment which in fact amounts to the same thing. As this complaint does not comply with the requisites of that section, it becomes necessary to inquire whether an averment of a breach in not paying the note can be dispensed with in an ordinary complaint.

It is not necessary for me to repeat what has been said by my brethren before, to show that according to former rules of pleading before the Code, the complaint was defective.

We have now been referred to forms cited from 3 Chitty's Pleadings, 1411, &c., of the edition of 1844, to show that no breach was necessary in an action upon a note.

It may be doubted whether it was not intended in those forms to add the general breach which follows in the next division under the common counts. It certainly seems to have been so intended when a count on a note and the common counts were united together, as a form is given in such a case.

But whether it was or not, it is sufficient to say that these forms were adopted by the judges as short forms of pleading under the provisions of a statute which authorized the dispensing with many things which otherwise were necessary.

It was in fact a statutory form of declaring on a note, similar to that adopted in the Code, and which was of no authority where the statute was not in force. That form also contains an averment that the time of payment had elapsed, which is wanting in the present complaint.

We are also referred to the case of *Allen v. Patterson*, (3 *Seld.*, 476), as authority to show that no breach is necessary to be averred in the complaint. That case is no authority for such a proposition. The action was for goods sold and deli-

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vered. The complaint charged that the defendant was indebted for goods sold and delivered by the plaintiff to the defendant in a specified sum, and that there was due and owing to the plaintiff from the defendant a specified amount. The objections taken to the complaint were two: first, as to the form in stating indebtedness as the ground of action, and second, that the allegation that "there was due to the plaintiff from the defendant," &c., was not a sufficient averment of a breach.

The Court of Appeals held that the first objection was untenable, because in stating what the indebtedness was for, the pleader had also stated all the facts necessary to constitute the cause of action as to the sale and delivery of the goods; and as to the second objection, that the allegation that the amount was due from the defendant to the plaintiff, was an averment that the money sought to be recovered had become payable, or the time when it was promised to be paid had elapsed. Judge Jewett nowhere intimates that an allegation that the debt had become payable was unnecessary. On the contrary, the whole of his argument was to show that there was a breach of the contract averred, and that the term due was equivalent to "payable."

In the complaint now under consideration there is no allegation that the note has become payable, or that it is due, nor anything to show the defendant in default, except an allegation that a sum of money the same as that secured by the face of the note is due to the plaintiff—from whom or for what purpose does not appear. A general denial of all the facts stated in the complaint would not raise an issue as to whether the note had become payable or not, because there is no such allegation there. A denial of the latter allegation, that the sum of \$204.67 was due to the plaintiff, would be immaterial, because it would be an issue upon a matter not connected with the note, the subject of the controversy. The defect has probably arisen from intending to use the statutory form, and yet departing from that form, brief as it is.

I am free to admit that these objections are strictly technical, and that under the present system of pleading, the courts should not encourage such technicalities any farther than is necessary for the due and orderly administration of justice.

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And I think it is a matter unworthy of commendation that the counsel on both sides have seen fit to engage in this long contest on points totally unnecessary to the disposition of the merits of the controversy. The defendant might have made any defence that he had to the note on which he was sued, by setting the same up in his answer notwithstanding the technical objections which he has made to the complaint, and the plaintiff after the demurrer was put in would have been allowed to amend the same without costs, and he was so informed in one of the opinions heretofore delivered. When this case was formerly before the general term, I was disposed to disregard these defects as being merely matters of form, and such as by the provisions of the Code might be disregarded as not causing any injury or prejudice to the opposite party, though I did not doubt that as a pleading the complaint was defective, and the court then so decided.

The cases now cited, do not in any degree warrant the conclusion that in an action on a promissory note, it is not necessary in the complaint to show the defendant default as to payment, and even the short statutory form provided in section 162 of the Code, contains the averment of a breach which requires the plaintiff to say that there is due to him from the defendant on the note the amount claimed. If the pleader had gone thus far, it would have been sufficient. Not having done so, his complaint is defective, and if he insists upon the decision of the court upon this question rather than amend his complaint as suggested to him in the first instance, we must so hold, however much we may dislike to encourage such objections.

The judgment must be affirmed.

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SEYMOUR a. ELMER.

*New York Common Pleas ; General Term, April, 1855.*

**DEFAULT IN JUSTICE'S COURT.—PROOF OF "MANIFEST INJUSTICE."**

Defendant's attorney having suffered default in a district court by being delayed in arriving at court by circumstances liable to occur without his fault, he being under the misapprehension that no defaults were taken until an half hour after the return hour of the summons ; *held*, that the default was excusable.

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The only witness for plaintiff having been the assignor of the claim sued on, an affidavit by the defendant that injustice was done to him by the judgment in default, *held*, under certain circumstances sufficient upon that point, in a motion to open the judgment.

Application to open a judgment of a district court.

The plaintiff sued for rent as assignee of the lessor. Suit was brought in the Justice's court of the 4th Judicial District. It appeared from the return of the justice and the affidavits, that upon the return day of the summons, the case was called very soon after 9 o'clock, that being the hour named in the summons. The defendant did not appear. The plaintiff proceeded, and called and examined his only witness, the assignor. The justice thereupon gave judgment for the plaintiff.

Soon after such judgment had been rendered, and it being then only about 15 minutes past 9, the defendant's attorney arrived. He, supposing that it was the practice of the court to take no defaults until half an hour after the time named in the summons, had been detained a few moments upon his way to the court by meeting a client and conversing with him respecting the transaction of certain of his legal business on that day. On coming into court at about quarter past nine, he informed the justice that he appeared for the defendant. The plaintiff's attorney meanwhile had procured a transcript of his judgment from the clerk. The justice informed defendant's attorney that judgment had been given, but that he would open the default if the plaintiff's attorney, who had not yet left the court room, would consent. Defendant's attorney then applied to plaintiff's attorney, offering to make an affidavit of merits and pay the costs of the default; but the request was refused. The justice thereupon declined to open the default.

The defendant appealed.

*Thomas S. Somers* for Appellant.

*Franklin Brown* for Respondent.

WOODEUFF, J.—The absence of the defendant's counsel at the time this cause was called for trial, arose from circumstances liable to occur without any fault on his part, and the

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misapprehension under which he was delayed for fifteen minutes after the hour at which the summons was returnable, considered in connection with the fact that the plaintiff's counsel and witness were still in court, and the court willing to take up the cause if the plaintiff's counsel would consent, seem to me sufficiently to excuse the default.

Upon the question whether manifest injustice has been done, the case is not quite so clear. If the facts sworn to by the defendant are true, then injustice is manifestly done by the judgment; and, on the other hand, if the statements of the assignor of the plaintiff are true, the judgment is just. We have heretofore considered that where it appeared by the papers that the plaintiff's case was established by an indifferent witness, and nothing appeared on the part of the defendant but his own unsupported oath, where he could not himself be a witness on the trial, it would be of no avail to order a new trial, since we were not advised that the result of a new trial could be other than the result of the first, nor in such case could it be apparent that injustice was done. In this case the assignor of the plaintiff declares himself to be the representative of the plaintiff in the matter of the suit. It is not certain but the assignor may prove to be himself incompetent, and if not, his testimony in the relation he occupies will be received with caution, and if examined, the defendant himself will be a competent witness to the same matter. Though not without some hesitation, I have come to the conclusion that a new trial should be ordered upon terms. The defendant must waive any claim (if any he have) to restitution of the costs paid on appealing, and must pay the respondent's costs on appeal, and the parties must appear before the justice on the fifteenth day of May next, at 10 o'clock, A. M., and proceed with the trial at that time, or on such days as the justice of the district court may by adjournment appoint.

LOWBER *v.* CHILDS.*New York Common Pleas ; General Term, April, 1855.*

## MECHANIC'S LIEN.—JOINDER OF PARTIES.

The dismissal of a proceeding in the Marine Court instituted under the mechanic's lien law, upon the ground that the contractor was not made an original party thereto, is erroneous.

The Marine Court has power to cause the contractor to be made a party, and to be brought in when his presence is necessary.

Appeal from judgment dismissing proceedings to foreclose a mechanic's lien.

The plaintiff Lowber commenced an action in the New York Marine Court to foreclose a mechanic's lien. His notice of lien was addressed to Winters and Childs. Childs was the owner of the premises sought to be charged; Winters was the contractor engaged in building; Lowber was a material man. Due notice to close the lien was served on the defendant in the notice, Childs; but none was served on Winters.

On the return day Childs appeared by his attorney, and the notice and proof of service upon him and a bill of particulars having been filed by the plaintiff, the attorney of the defendant Childs moved that the proceedings on the part of the plaintiff be dismissed, on the ground that the contractor Winters had not been made a party to the proceeding; that no notice or process had been served upon him to bring him into court.

The justice thereupon inquired of the attorney for the plaintiff if he wished to bring said Winters into court, and make him a party to the proceeding; which, the justice said, the plaintiff would be permitted to do if he wished. This offer being declined, thereupon on motion of the defendant's attorney, the justice dismissed the proceedings with costs.

The plaintiff appealed.

Charles E. Nott for the appellant, contended that the act (*Laws* 1851, *p.* 953) does not require the contractors to be made a party; that the case of *Sullivan v. Decker* (1 *E. D. Smith's R.*, 699), relied on by the respondent, did not make the contractor a necessary party, but only a proper party.



*S. Sanway* for respondent, insisted that the circumstances gave no ground for appeal; that there was no judgment, but only a dismissal of a preliminary proceeding, or rather a refusal to act; and if error, it could only be corrected by mandamus or certiorari. That the case was not before the justice, the notice being wholly insufficient; but if it was, the judgment was correct; because the defendant Winters was a necessary party, and the Marine Court, he urged, is vested with no equity powers, by which to bring him into court.

WOODRUFF, J.—The opinions given by this court in *Sullivan a. Decker*, (1 *E. D. Smith*, 599), do not warrant the judgment rendered in the Marine Court in this action; and the decision in *Foster a. Skidmore* (*Id.*, 719) is, so far as this court is concerned, conclusive that such judgment was erroneous. The plaintiff had taken the very steps which the statute prescribed, and the court thereby obtained jurisdiction of the matter and should have proceeded therein.

I do not discover any defect of power in the Marine Court to make any order which may be essential to carry into full execution the jurisdiction which the statute itself has conferred upon them, by authorizing the proceedings to be had in that court; and in this respect it is not material whether the foreclosure be deemed a strictly legal or an equitable proceeding. Besides, section 64, subdivision 15, of the Code of procedure, makes the provisions of the code, respecting *parties* to actions, applicable to the justice's courts, and section 68 in like manner, makes section 64 apply to the Marine Court. Section 121 of the Code, in terms provides that when a complete determination of the controversy cannot be had without the presence of other parties the court *must* cause them to be brought in. It seems to me that in this the Marine Court have ample power to cause a contractor to be summoned, and that it should have been done. But further, it appears by the notice to bring the lien to a close, that the contractor was made a party defendant, and if one defendant only had been served, still the proceedings should not have been dismissed,—the defendant might have been brought in, as in cases where only one of two defendants is served.

The judgment must be reversed.

## NEW YORK AND NEW HAVEN R. R. CO. v. SCHUYLER.

*Supreme Court, First District ; Special Term, May, 1855.*

## JOINDER OF PARTIES.—MULTIFARIOUS COMPLAINT.

A bill of interpleader can only be filed when the plaintiff has no claim adverse or hostile to the parties defendant. If the complaint asks for relief specifically against the defendants—further than to require the defendants to interplead with each other—the bill is not one of interpleader, or in the nature of a bill of interpleader.

*It seems*, that a corporation is composed of the aggregate body of individual corporators united under the charter, and is in no sense a trustee for the individual corporators.

Suits heretofore known as *bills of peace* may be brought to avoid multiplicity of suits, and may embrace a large number of defendants. But such suits must relate to matters of the same nature, having a connection with each other, and in which all of the defendants are more or less concerned, though their rights in respect to the general subject of the case may be different.

Such bill must have for its foundation some issue which concerns all of the parties defendant—an issue with which each defendant is connected, so as to give the plaintiff a right to a decree as to each one in respect of first issue and common question.

Where there had been a fraudulent over-issue of the stock of a corporation beyond the amount allowed by its charter by the act of its duly authorized transfer agent, and a part of such stock was held by guilty parties with knowledge of the fraud, and a part had gone into the hands of innocent purchasers for value and without notice:

*Held*, that a bill filed by the corporation against all of the holders of the over-issue, asking to have the certificates delivered up and canceled, would not lie, and that such complaint was multifarious.

*Held*, further, that in such case the complaint showed on its face that the corporation had no right of action against the innocent purchasers of the false stock, but was itself liable to them for the acts of its transfer agent in issuing it.

*Held*, that as to the parties defendant in such bill when such had purchased at different times from different persons on contracts separate and distinct from each other, there was no common issue or question embracing all of the parties, and in which each was interested, and in which all were concerned. There was no privity of contract or interest between them, and they could not be joined in one action.

Whether the corporation could have a decree against the guilty parties alone for a surrender of the false stock ? *Query*.

*It seems*, that a bill may be filed against the whole body of confederates who unite for the commission of an act in violation or fraud of the rights of the plaintiff, however numerous those parties may be. The combination to defraud unites them all together, and presents an issue common to all ; and a decree may reach them as a body and each one personally—even though in carrying out the details of that common object each one may have performed acts, and claimed to have acquired rights, personal to himself and independent of his confederates.

Demurrer to a complaint.

This action was brought by the New York and New Haven Railroad Company against three hundred and twenty-four defendants, for the purpose of settling in one suit the numerous claims and questions which arose out of extensive frauds committed by Robert Schuyler, the former president of the corporation, plaintiff. One of the defendants, Cross, demurred to the complaint.

The facts involved, and the substance of the pleadings, appear in the opinion.

*Messrs. Tracy, Dodge, Noyes, Powers and Talmadge*, for plaintiffs.

*Messrs. Cutting, Foster and Thompson*, for defendant Cross.

COWLES, J.—The defendant, Cross, demurs to the complaint, and on grounds which raise the question whether this suit can be sustained. The facts set forth in the complaint are as follows.

The plaintiff is a corporation, owning and operating a railroad extending from New Haven to New York. The capital authorized by the charter is limited to \$3,000,000, represented by 30,000 shares of stock—all of the shares except 78 having been issued, and the capital paid in, less about \$700 on the 78 shares, several years since. Transfer books of the stock were kept at the city of New York and two other places, where transfers of the stock were made, and certificates issued as occasion required. From the organization of the company in 1846 to the third of July, 1854, Robert Schuyler was the president and transfer agent of the company, having his station and place of business at the office of the company in New York. As early as October, 1853, he commenced a series of fraudulent acts, extending over the whole period of time intermediate that date and the 3d of July, 1854, during which time unknown to the plaintiff he issued and disposed of large numbers of certificates of stock of the company, which on their face purported to be genuine, were executed and signed in the same manner as genuine certificates, and undistinguishable from them, but which in fact were fraudulent over-issues for his own private purposes. Some of these he issued to a firm

of which he was a member. The others were issued to divers other persons.

In other instances, after making transfers of stock for other parties on the books of the company, he failed to cancel the old certificates which were surrendered for that purpose, but fraudulently re-issued them as genuine certificates of stock owned by himself.

In furtherance of his designs he allowed clerks of his firm to give the firm a false credit on the stock ledger of the railroad company, by which it was made ostensibly to appear that such firm had stock to their credit on the books of the company to \$1,000,000, when in truth it owned none.

These false certificates, purporting to be genuine, and these originally genuine certificates, which, instead of being cancelled, were re-issued, were used by Robert Schuyler, in his own and in the business of his firm, under representations that they were genuine, chiefly for the purpose of borrowing money: were sold openly in the market as genuine stock in some instances, and have passed in this way into the hands of the defendants, the present holders.

In some instances this over-issued stock has become commingled with genuine, by having, in the regular course of business, been transferred and incorporated into a certificate with the genuine.

The whole false issue amounts to near \$2,000,000. Nine thousand three hundred and eighty-three shares now stand on the books of the railroad company, in the names of 29 persons and firms, to whom it had been transferred by the firm to which Schuyler belonged. The balance of such over-issues have gone to the hands of 266 other persons and firms, at different times, in different amounts, from different persons, and many of these holders are also the holders of genuine stock.

Intermediate the 29th of June and the 3d of July, 1854, Schuyler, the president and transfer agent of the company, being sick, Mr. Worthen, the vice-president, who was also one of the directors, undertook, but as plaintiff says, without authority, to act as transfer agent in the place of Schuyler, and unaware of Schuyler's frauds, transferred 4446 shares of

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that false stock for 21 different persons and firms, supposing the certificates he received and transferred to be genuine.

Some of the holders of this over-issue, as the complaint alleges, took, knowing the certificates were fictitious, some with reason to believe so, some on usurious contracts, many under circumstances which should have put them on inquiry, and many others under circumstances and upon considerations unknown to the plaintiffs.

They all claim rights against the company, some that they are stockholders, others that they are either stockholders or have a right of action against the company for their losses. Some claim damages to the full nominal par value of the certificates they hold—others for the money they have actually advanced, while all assert a claim upon the company in some form.

It is not denied that some of these fraudulently issued certificates have gone into the hands of entirely innocent parties for value.

Several of the defendants have sued the company; some suits are pending in this court, some in the Superior Court, and others in the Common Pleas of this city. Other suits are threatened. The plaintiff has joined in this suit Robert Schuyler and all the alleged owners or holders of this over-issued stock and prays that the certificates may be decreed illegal and void, and be surrendered up and canceled. That until these questions are all settled those who have sued be stayed in their proceedings, that those who have not, be enjoined from suing, that the suits now pending be consolidated with this, and closes with the usual general prayer for such further or other relief as is meet and proper.

To this complaint this demurrer is interposed.

From the above examination of the complaint, it is seen that the holders of this over-issued stock, (and which, for distinction, I will call spurious stock), have not come in possession of it under a uniform state of facts.

1. There is the firm of R. & G. L. Schuyler, who, or whose assignees, hold by title derived directly from R. Schuyler himself, a member of the firm and the author of the fraud. Whether the firm paid value for it does not appear.

2. There is the class who took from Schuyler with knowledge of the fraud, or have taken under circumstances which it is alleged should have put them on inquiry.

3. A class who hold by title based on usurious contracts with Schuyler.

4. Another still to whom the stock has been hypothecated as security.

5. There is a class who hold certificates originally valid and regularly issued, but which have been surrendered up for cancellation, and then, as plaintiff alleges, stolen by Schuyler and re-issued.

6. There is another class who hold under certificates issued by the Vice President, Worthen.

7. There is another class of innocent holders who have taken without knowledge of any fraud. I assume that such is the fact, because it is not averred in the complaint to the contrary, and among these numerous holders, of the consideration of whose purchase the plaintiff is ignorant, the presumption is they are innocent holders till the contrary is alleged.

8. There is still another class who hold certificates representing in part genuine and in part spurious stock.

Now, upon these facts, assuming them as true, and assuming that this suit shall proceed with the view of determining all questions arising on the facts, it is quite clear that some of these holders are entitled to recover, whatever may be the decree as to others.

With regard to others, it is equally clear the plaintiff would, at the proper time, be entitled to judgment, while with regard to others still, the respective rights of the parties could not be decreed without the solution of difficult and perplexing questions of law, and undoubtedly of intricate questions of both law and fact, since we are not to presume that these parties defendant will suffer judgment to pass by default.

The decree when finally made would necessarily be in the nature of distinct decrees against the several parties separately, and as above observed, as to some, must be against the Railroad Company; in other cases in its favor. Thus, as to those who have taken with full knowledge of the fraud, and the complaint avers that some did, the decree must be against the

holder—a proposition too obviously true to need discussion. As regards the innocent holders, those who have taken for value without knowledge of, or cause to suspect the fraud, the validity of their claim upon the plaintiff for full indemnity in some form, is perfect. True, that proposition only comes up incidentally on this demurrer, and it is but just to say was not made a subject of discussion by the eminent counsel engaged in the argument. Yet, in the view I take of the case, it presents itself as forming one of the elements in the proposition I am seeking to demonstrate, viz. : that upon the facts set forth in the complaint, the decree in this suit, if the bill is sustained, must be against the plaintiff as to some at least of the defendants.

Under that view of the case I am permitted, as regards the innocent holders for value without notice, to say, that well settled, long established principles of law defining the responsibility incurred by principals for the acts of their agents, determines the question of liability for the acts of Schuyler against this corporation, while at the same time fair dealing, an enlightened equity, sound morals and public policy, all concur in requiring there should be no relaxation of the rule. Corporations, capable like natural persons of constituting general agents, doing their business solely through agents and boards of directors, in whom all having transactions with them must more or less confide, should be held to a very strict accountability for the acts of their agents, and the policy and necessity of such rule increases in practical importance just in proportion to the magnitude of the business intrusted to, and performed, by these corporate bodies.

Passing on to the class of persons who hold these certificates under usurious contracts, while I am not called upon to anticipate at this stage of the case what rule of law must be applied there, it is sufficient to say that as to those holders, the decree depends on a solution of questions of both law and fact, (for I cannot assume that the usury will not be denied by answer), which, in their character, are separate and distinct from, and independent of, the questions raised in the other classes of cases.

Again, the rights of parties holding certificates originally valid, then surrendered for cancellation, and afterward surrep-

titiously issued, requires the solution of still other questions of law, (probably of law and fact,) for the plaintiff claims to treat such certificates as *stolen*, and so not vesting in any other holder, whether innocent or guilty, either right of property or of action.

And so as to all of these holders, the different state of facts under which each has taken, and the different rules to be solved and applied, show that not only must there be separate and distinct adjudications in their nature, independent each of the other, but also that no one class of holders has necessarily any interest in the questions which must control as to every other class.

Each party is entitled to be separately heard, and this requires separate trials for each separate defendant, since between no two of them is there a privity of title or interest.

A further effect, which necessarily follows a joinder of all these defendants, is that while each defendant prefers a claim which is distinct from that of every other, yet no judgment can be given in his favor until a general decree is made as to all.

Thus the one who holds as a *bona fide* purchaser without notice cannot, upon proving the facts which apply to his case, take judgment and enforce his rights without regard to the other defendants, but must remain inactive with no ability to proceed until all the complex, intricate and perplexing questions of law and fact affecting every other party have been tried, the questions passed upon, appeals taken and disposed of, (should either party wish to appeal), reviewed in the Appellate Court, perhaps sent back, then re-tried, re-determined, and perhaps (for who knows to the contrary?) re-appealed, and all this, too, while he has no interest whatsoever in the questions thus litigated between the plaintiff and any other party than himself.

If this suit is to be maintained, such must necessarily be its effect, provided the bill has for its object the end avowed by the plaintiff, viz: a final determination between the plaintiff and each holder of all questions respecting this over-issue of stock. If such *is* the object of the bill, the results I have mentioned, must follow. If it is *not*, the bill should be dismissed.



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I have assumed that the several defendants may, by way of counter-claim, set up the demands they assert against the Company. Whether, under the Code, they *can* do so, may be a serious question; but, without deciding, I will assume they can, since that is the view of the case most favorable to the plaintiff. Assuming that, and then tracing, as we have, the nature of the proceedings to follow, provided the demurrer is overruled, with a view of determining the character of the suit, we find it resolves itself into a proposition to try in one suit nearly three hundred separate and distinct causes of action, claimed to be held by as many different parties, having but one feature common to all, viz: that the basis of these several claims is a fraud perpetrated by the plaintiffs' agent. Will such an action lie?

Plaintiffs aver it can be sustained as a *bill of interpleader*; but that seems impossible, because the plaintiff in such bill must have no interest in the subject of the litigation.

When that is the case, and the plaintiff has not the means, without hazard to himself, of determining to whom among several and rival claimants the fund in his hands is properly payable, he will be permitted to bring the fund into Court, and compel the rival claimants to interplead each with the other, while the only decree the plaintiff can have, is, that the bill was properly filed.

I can see no feature in this case which in principle brings it within that class of bills, (*Story Eq. Juris.*, § 807, and cases there cited; *Har. Ch.* 96; *Cooper's Eq.* 456; *Atkinson v. Monks*, 1 *Cow.* 694, 703). In the case last cited, Mr. Justice Sutherland lays down the following as the distinguishing feature of a bill of interpleader:

1st. That two or more persons have preferred a claim against the plaintiff. 2d. That they claim the same thing. 3d. That the plaintiff cannot, without hazard, determine to whom it belongs; and 4th. That he has no interest in the thing claimed. Here the plaintiff is directly interested. The suits brought, are to recover directly from this corporation the losses sustained by these several holders, or in some form to make the corporation itself responsible for the acts complained of. Again, these parties do not claim the *same thing* further than they all seek

to make the corporation personally liable for their losses. But this is not, within the meaning of the rule above stated, any more claiming the same fund, or thing, or duty, than would be several different claims by several different parties to recover for as many several and independent wrongs inflicted on each, and for which each would have his separate redress.

It is argued that the plaintiff has really no interest in this controversy, on the ground that the corporation is but a trustee, charged with the protection of the interests of the holders of its stock, and holding its property in trust merely for the several individual corporators, and so disinterested as between the holders of the genuine and alleged fraudulent stock. The argument overlooks the fact that it is the *aggregation of individual corporators*, united under a charter which constitutes that *legal entity, that artificial statutory person, which is created by law, and termed a Corporation.*

In this case the aggregate body of individual corporators united together under this charter, which gives them a common name, a common seal, perpetual succession, and which is known by the name of the New York & New Haven Railroad Company, is what constitutes this Corporation.

The charter merely binds together in interest (so that it can act with unity) this body of constantly changing parties, and, in the very nature of things, there can exist between the Corporation and the individual corporators, by virtue of this corporate organization, no such relation as that of trustee and *cestui que trust.*

A Corporation is a *unity*, but it is the aggregation of the individual corporators under the charter which *makes the unit.* (*Kyd on Corp.*, 13 *Dart.* Call *vs.* Woodman, 4 *Wheat.* 436; *Providence Bank vs.* Billings, 4 *Peters*, 562).

Nor can the bill be sustained as one *in the nature of a bill of interpleader.* In such cases the plaintiff has a certain species of interest in the matter in dispute, but his rights are affected by rival claimants; as in the case of a mortgagor who, wishing to pay up his mortgage and have the lien discharged, finds that several parties claim the moneys which he admits to be due to some one. The Court will allow a bill *in the nature of a bill of interpleader* in such case. And numerous other cases

might be cited in which such bills are proper; but the facts must bring them within the same general principle. (*Story's Eq. Juris.*, 824, and the cases there cited). But there is no analogy between that class of cases and the present. The relief the plaintiff asks consists in the assertion of a positive right, adverse and hostile to the parties defendant. Plaintiff charges that the defendants hold spurious certificates of the stock of the Company, and demands that those certificates be declared void, surrendered up and canceled.

Here at once is a direct conflict between the plaintiff and the defendants. But, how, or in what way are the defendants to interplead? What has any one defendant to demand as against any other defendant, or against the aggregate of the defendants? Should the Court decree them to interplead, what are they to plead? what judgment is the Court to give as between these several defendants? It is quite plain what judgment must be given on the facts pleaded as between plaintiff and some of these defendants; but as between defendant and defendant, it is equally plain there is no judgment to be rendered.

Nor can I discover any principle on which the complaint can be sustained as a *bill of peace*. Such bills are well known and are proper in a variety of instances, and may be filed against a large number of parties. Such as a bill to establish a right to an exclusive, as against many who claim a several, right of fishery. To establish a right to the exclusive enjoyment of a tract of land against all the inhabitants of a particular manor, district, or township, claiming rights of common in the same land. A bill by a patentee to establish or protect his rights against numerous others engaged in infringing those rights, and in numerous other instances, where the main question to be decided, applies equally to all the defendants, or is one in which they are all equally interested or with which they are in some way connected. (*Story Eq. Juris.* § 853 to § 857, 3 *John R.*, 566. *Trustees of Town of Huntington v. Nicholl*, 3 *Johns.* 506; *Brinckerhoff v. Brown*, 6 *John. Ch. R.* 139).

So also bills filed by a party claiming some right or entitled to some relief against all of the defendants, (and they may be very numerous), based upon a confederacy or combination

among those parties for the accomplishment of a general object, to the injury of, or in fraud of the rights of the plaintiff, are of this class. In such cases, to avoid multiplicity of suits, the bill will lie against all the confederates in the fraud, they being engaged in one common object, and that too, although in carrying out the details the several confederates may have performed acts, or claim to have acquired rights, separate and distinct from those claimed by any of the other defendants. If the one common object which was the starting point of the combination is made out, then the separate interests or acts of the several defendants are but emanations from a common source.

Such was the nature of the case in *Brinckerhoff v. Brown*, (6 *Johns. Ch. Rep.* 139), commented on and approved in *Fellows v. Fellows*, (4 *Cow.* 682). There the charge was a combination of all the defendants in one common object—*fraud*—to carry out which general object a series of separate and distinct acts were performed by each defendant, and those acts, independent of and distinct from other acts performed by others, yet all in furtherance and consummation of the general object which formed the confederacy, viz: *Fraud*.

The plaintiff had a right to be relieved against the effects of this combination, and this brought the case within the rule laid down by that profound jurist, the late Chancellor Kent, who, in *Brinckerhoff v. Brown*, said—a general principle deducible from all the cases is, “that a bill against several parties must relate to matters of the same nature and having a connection with each other, and in which all of the defendants are more or less concerned, though their rights in respect to the general subject of the case may be different.” That general principle applies to all cases where there is a multiplicity of parties and the bill is filed to avoid multiplicity of suits. The bill must then have for its foundation some issue which concerns all the parties brought in as defendants—an issue with which each defendant is in some way connected, so as to give the plaintiff a right to some relief as to each one and against all.

The several interests or questions represented in the persons of the several defendants, must, like the several branches of a

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tree, have one common trunk from which they all originate. That trunk is the one common object with which the several parties defendant are all connected as offshoots from it. The decree, like the forester's axe, is aimed at that trunk, and the fate of the body becomes the fate of its branches. The idea I would convey is expressed in the figurative language employed by Chancellor Kent in *Brinckerhoff v. Brown*, where he says:

"The several defendants performed different parts of the same drama—it was still one piece—one entire performance, marked by different scenes."

If I understand the authorities, the above rules are of universal application; and this case, to be sustained, must be fairly brought within those principles. The plaintiff must have rights to assert or relief to demand against all. The first element, the first ingredient in a bill, its very basis, is a right to relief in some form, and that against not a portion merely, but against all the defendants, otherwise they cannot be joined. If the plaintiff is in the wrong, and the right, if any exists, is one which it is for the defendant to assert against the plaintiff, it will hardly be contended that the plaintiff can select his forum—sue the defendant—call him into court, and then ask the court to compel him to prosecute the plaintiff in that forum, or forever hold his peace.

I know of nothing in the history of our jurisprudence which will be claimed as authority for such a step.

Now, keeping the above rules all in view, how stands the case with this railroad company, the plaintiff here? We find that its own agent, held out by it to the world as one in whom implicit confidence might be placed by all dealing with the corporation, or buying its stock—we find that this man, the president of the company, violates the confidence reposed in him by the plaintiff. But in what way? Has he taken the funds, or property, or assets of the company, and then, confederating with the defendants, undertaken to distribute or share them with the defendants, in fraud of the company? No; he has not touched a dollar of those funds, or any part of the company's assets. He has only issued certificates which purport to be evidence that the party to whom they were issued was a stockholder to the extent named in the certificate, when

the fact was not so. The certificates are false. They say what is not true; but, holding the position given him by the plaintiff, and known as the president of the company, he is enabled to sell them, or procure them to be sold. They are sold openly in the market, and in part, at least, to innocent purchasers, who suppose, and have every reason to suppose them genuine. They part with their money for these certificates—are victimized, and then Schuyler runs away. Now, take just what the plaintiff says about all this, viz.: that a part of these purchasers are guilty confederates with Schuyler, or at least that they bought with full knowledge of their false character. If that is so, then under no circumstances as to those holders can the company sustain any loss, for the certificates are as valueless to the guilty holder as an equal amount of counterfeit bank notes. If they sue, the company has only to defend and defeat them. But there are others who confessedly are *innocent purchasers* of these false certificates—for value and without notice—and they are made parties here. Now against those parties what rights have this corporation? What claim has the company on them? What claim can it have? What, in the shape of a decree, will this railroad company ask this court to make in its favor, and against these innocent victims? To give up these false certificates, fraudulently imposed upon them by the plaintiff's own agent, in whom this company had assured them they could repose unlimited confidence? What right has this corporation acquired as against these innocent holders, that they should have such a surrender made, or will the corporation ask that these parties be compelled to sue the corporation? That, as it seems to me, is clearly the *effect* of sustaining this bill against these innocent holders, viz: to enable the plaintiff to select the forum and compel these parties to sue there, or not at all—that is, if by a joinder it is intended in this action, as is avowed, *to have all questions arising out of these frauds adjudicated*—for I have already held that these innocent purchasers have a perfect right to full indemnity against the company for the acts of Schuyler. But they would thus not only be compelled to litigate in a forum selected by their adversary—by an adversary, too, who had no possible right of action against them

—but to do it in the same action with numerous other defendants, between whom and themselves there is not the most remote connection. I know of no rule which can render such a bill proper.

As to the guilty holders, I have already said they have no rights against the Company, and that if they sue, the Company has but to defend to defeat them.

But the bill seems to be based upon the idea that there is a species of value or property in these certificates which entitles the Company to have them surrendered. This might possibly be the case as to all confederates of Schuyler in the fraud, who hold these certificates and are asserting some claim upon the Company, under them—but even that is doubtful—for as to the guilty holders, the certificates are worth no more than the forged notes of the Company. But would a bill be sustained to compel a surrender up of forged notes, filed by the person whose name purported to be signed to the notes? It seems to me not. If, instead of issuing \$2,000,000 of false certificates, this Company had held securities to the same amount—say bonds of some other company—guaranteed by the plaintiffs, and Schuyler had confederated with these defendants to sell and distribute the securities among the defendants in fraud of the plaintiff, and had consummated this fraud, then on principle, this Company could have filed a bill against all the parties, and asked to have the securities surrendered, and each defendant enjoined from suing on the guaranty—if such suits had been commenced or threatened.

But suppose the plaintiff holding just such securities, had authorized Schuyler to sell them, and he had sold a part to innocent purchasers for value, and had combined with certain others to dispose of the residue in fraud of the Company, and had not only done so, but had appropriated the purchase money paid by the innocent purchasers, to his own purposes, would a bill filed against him and his confederates in the fraud, lie against the innocent holders too, to procure a surrender of their stock? That will not be claimed.

Now I do not assert that the case at bar is parallel in all respects with the case I have supposed; but as it seems to me, it is sufficiently so to be governed by the same general princi-

ple. As between these innocent holders, and Schuyler and the guilty holders, I can see no "matters of the same nature, and having a connection with each other, and in which all the defendants are more or less connected" within the meaning of the rule laid down in *Brinckerhoff v. Brown*. Had they all been guilty of the fraud, or directly or indirectly conspired with Schuyler, there would have been a common question as to all.

The joint intent to defraud, would have formed the body, and the acts and interests of the several defendants the branches, and then that part of the case would have been made out for a bill, and a proper bill too, if the other facts warranted.

But no such common question, nor any question as far as I can perceive, arises, or is made out, which connects the several parties, or entitles the plaintiff, admitting all his facts—to a decree against any parties, certainly against none who are innocent purchasers; and the guilty ones, except Schuyler, are not pointed out in the complaint, and so I must presume Cross an innocent one.

The mere fact that all of these parties happen to hold the false certificates, does not bring them within the rule laid down by Chancellor Kent.

But there seems to be a further general rule (although the rule to which allusion has already been made, has its exceptions,) that a Bill of Peace will not be sustained to enjoin numerous defendants from bringing separate suits until the plaintiff has first established his rights by trial in a court of law as to some one of them. *West vs. The Mayor of New York*, (10 *Paige*, 539). The case of a patentee after succeeding on a trial at law, is a familiar illustration of the rule that it may lie afterwards. On the whole I can discover no principle which applied to this case will sustain the complaint. The difficulties are irremediable, such as are incident to and inherent in the nature of the case itself. Convenience will not sanction it—for should an attempt be made to proceed with the suit, no ingenuity or perseverance of counsel—no aid which the court could furnish, can relieve the case from these perplexities, embarrassments and delays which must necessarily



attend every attempt to urge it forward ; while on the other hand, the chance of frequent deaths and other accidents incident to the case, with the necessity of numerous revivors, would enable any party, should interest so prompt, to make the litigation almost interminable. I regret the conclusion to which I am forced. I had hoped to discover there was a mode by which in a single suit embracing all parties, those questions affecting interests of such magnitude and parties so numerous, might be speedily solved—and the rights of all determined. We find here a loss, through the faithlessness of one man, amounting to near \$2,000,000, all or nearly all of which must fall upon innocent parties—whether such loss is sustained by the holders of the genuine or spurious certificates, or in part by each. Such a loss is a deplorable public calamity. Could the aggravation of these evils caused by numerous and protracted suits, brought to settle the questions arising out of this fraud, be avoided, and a speedy determination arrived at in one action, the court would gladly, if it had the power, entertain jurisdiction and terminate the controversy. But increased reflection has but confirmed my convictions that the difficulties of pursuing such a course cannot be overcome. For such obstacles the eminent pleader who drew this bill, is not responsible. They have their origin in the nature of the case itself, rendering a joinder of all these defendants in one bill, under the circumstances, an impracticable mode of determining the rights of the parties.

The complaint is multifarious.

The demurrer must be sustained, and judgment ordered accordingly with costs, and the injunction as to the demurrent dissolved.

## GINOCHIO a. ORSER.

*New York Common Pleas ; Special Term, May, 1855.*

## ESCAPE.—LIABILITY OF SHERIFF.

The sheriff cannot protect himself in an action for an escape, by showing *irregularity* in an execution against the person upon which the arrest was made. But if the execution be *void*, the sheriff is not liable for an escape of the debtor. The sheriff may protect himself in an action for an escape, by showing that the judgment debtor was privileged from arrest.

Motion to strike out portions of an answer.

The portions of the answer objected to, and the grounds of the motion, appear in the opinion.

WOODRUFF, J.—This action is prosecuted against the sheriff of the city and county of New York for an alleged escape of one Figari, who it is alleged was arrested on a *ca. sa.* issued upon a judgment docketed in the office of the clerk of the city and county of New York, in favor of the plaintiff.

The defendant in his answer among other things, sets up that "the paper alleged to be an execution, is void on its face, and was not issued by any person or officer authorized to issue the same. That the judgment docket upon which the same purports to be based, did not authorize or justify the issuing of an execution against the person of said Figari. That the defendant, Figari, was not liable to be, and could not be, arrested in the action in which said judgment is alleged to have been rendered, and said execution was null and void, and that this defendant could not lawfully arrest said Figari under the same, and could not lawfully detain him in custody upon any arrest under color of said pretended execution."

This part of the answer the plaintiff moves to strike out, and the grounds upon which the motion is urged, are:—

1. That the sheriff cannot in such an action, set up as a defence, the *irregularity* of the execution or of the judgment.
2. That the sheriff cannot plead that the judgment was satisfied or discharged.

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3. That the sheriff cannot set up as a defence *error* in the judgment as an excuse for an escape—but having arrested the defendant, he is bound to keep him until discharged by due course of law.

And therefore that the matters alleged in the answer, are immaterial, and should be stricken out.

That the sheriff cannot protect himself in an action for an escape, by showing error in the judgment or irregularity in the *ca. sa.*, has been repeatedly adjudged.

Thus in *Bissell v. Kip*, (5 *Johns.* 89), it was held that where the *ca. sa.* was *voidable* by reason of a variance between the writ and the judgment, the sheriff could not avail himself of the error.

So in *Scott v. Shaw*, (13 *Johns.* 378), *Cable v. Cooper*, (15 *Johns.* 152), and *Jones v. Cook*, (1 *Cow.* 309), in all which the process was deemed *voidable* for irregularity, the sheriff was declared responsible for the safe keeping of the prisoner.

So when a *ca. sa.* was issued after a *year and a day*, the sheriff when sued for an escape, cannot object to the irregularity of the *ca. sa.* (*Ontario Bank v. Hallett*, 8 *Cow.* 192).

The decisions in relation to the duties of a sheriff, under a *fi. fa.*, are of a similar purport. (*The People v. Dunning*, 1 *Wend.* 16. *Walden v. Davison*, 15 *Wend.* 575).

These cases recognize and affirm a distinction between process which is void and that which is voidable merely, and it is repeatedly stated that when the process is void, the sheriff is not bound to execute it, nor liable for any neglect, partial or total. But otherwise, if the process is voidable only; because if the defendant in execution does not seek to avoid the process, and where the court might if applied to, allow an amendment, the sheriff cannot avail himself of the defects in process. (*Ames v. Webbers*, 8 *Wend.* 545).

But on the other hand if the *ca. sa.* is *void*, it is equally well settled that the sheriff is not liable for an escape. There being in this class of cases a further distinction affecting the sheriff and his liability, *to wit*:—If the process is issued by a court of competent jurisdiction, and is *regular on its face*, it *protects* the officer in executing it. But when void *on its face*,

it furnishes no protection to the sheriff himself. But in neither case, *if void for any cause*, does it impose on the sheriff any *duty*, nor is he liable for neglecting or refusing to obey its mandate. The cases above cited, recognize this rule.

In *Jones v. Cook*, (1 *Cow.* 309), it is said that when a *ca. sa.* is void, the sheriff is not liable for an escape.

In *Earl v. Camp*, (16 *Wend.* 562), it is held that if an execution be *legal on its face*, it protects the officer; but that the plaintiff cannot recover against him for neglecting to collect it, unless it was issued upon a judgment which was not void. That in no case when the sheriff becomes satisfied that there is a want of jurisdiction, is he bound to act in any way, and if he refuses, the party cannot make him liable. The subject is fully discussed in this case, and numerous cases cited, and considered and approved, and especially the case of *Albee v. Ward*, (8 *Mass.* 79), in which an officer justified an escape, when the execution though fair on its face, was issued without authority, and yet it was held that the process was a complete protection to the officer.

So in *Horton v. Hendershot*, (1 *Hill*, 118), it was held that process regular on its face, but *void* as to the parties in whose favor it is issued for want of jurisdiction, was a protection to the officer; but he was not bound to execute it, and if sued, the officer may answer that the process was void.

And in *Cornell v. Barnes*, (7 *Hill*, 35,) the court say again, that an officer is under no obligation to serve process issued on a judgment rendered without jurisdiction, and its validity is a good answer to an action for refusing to execute it.

There is still another class of cases in which the sheriff has been permitted to protect himself by showing that the person of the defendant is privileged from arrest.

In *Ray v. Hogeboom*, (11 *Johns.* 433), it was held that an officer was *not bound* to notice that a defendant in a *ca. sa.*, was a soldier of the United States, and privileged from arrest; but if he choose to do so, he may, and if he can show that the defendant is privileged, it is a good defence, and having made an arrest in such case, he was held not liable for an escape.

In *Secor a. Bell*, (18 *Johns.* 52), and *Sperry v. Wellard*, (1 *Wend.* 32,) the privilege of an attorney which was formerly

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set up by his own act of suing out his writ of privilege, was held no protection to the sheriff.

But the principle of *Ray v. Hogeboom* seems to have been followed in *Phelps v. Barton*, (13 *Wend.* 68,) where it is said that the sheriff may plead in a bar of a recovery for an escape, that the defendant was exempt from arrest, under the non-imprisonment act.

And in *McDuffie v. Beddoe*, (7 *Hill*, 578), it is plainly intimated in conformity with the last case, that "when the arrest is made under a *ca. sa.*, regular on its face, but issued on a judgment in action on contract, the officer may lawfully permit an escape.

And it is to be observed that under the Revised Statutes, the recovery by a plaintiff in such an action, is no longer measured inflexibly and conclusively by the amount of the judgment and execution, as it was under the previous statute; (1 *Rev. Laws*, 425, § 19), but the recovery is confined to "his damages sustained thereby," of which such amount is no doubt *prima facie* evidence, but which may be reduced by various circumstances; and among them no doubt the freedom of the party from arrest would not only be ground of mitigating damages, but would conclusively show that *no* damages had been sustained—for since this statute, the court have held that poverty of the prisoner and other circumstances tending to show that the plaintiff has sustained no actual loss, may be given in evidence by the sheriff. (*Patterson v. Westervelt*, 17 *Wend.* 543, and numerous cases cited.—2 *Rev. Stat.* 437, § 61, and as modified by act of 1847, ch. 390, § 2, 2 R. S., 4th ed., p. 681, § 81).

The cases above referred to, seem to me conclusive upon this motion. If the *ca. sa.* was void on its face, or void for want of jurisdiction in the officer by whom it was issued, or the judgment did not warrant or justify a process against the person, or the defendant was not liable to arrest, these facts will either justify the sheriff in permitting the escape, or mitigate damages.

The motion must be denied. The defendant's costs of motion fixed at \$10, will abide the event of the suit.

THE REPUBLIC OF MEXICO *v.* ARRANGOIS.*New York Superior Court ; Special Term, April, 1855.*

## POWER OF COURT OVER ATTORNEYS. INQUIRY INTO AUTHORITY OF ATTORNEY.

The court will not compel a respectable and responsible attorney to exhibit in the preliminary stages of a suit his authority to appear, or his instructions in respect to continuing or discontinuing the action, where no indicia of fraud are shown.\*

The mere fact that another action has been commenced in another State after suit brought here, and that it is still pending, is no reason for ordering discontinuance of the suit in this State.

Motion that the attorney of plaintiffs be required to file with the clerk his authority to sue, and his instructions.

This action was brought in the name of the Republic of Mexico, to recover sums alleged to have been received by the defendant, as agent of the Mexican government. The action was commenced in January, 1855, and an order was then made holding the defendant to bail.

The defendant now moved for an order, requiring the authority for commencing this suit, to be produced and filed with the clerk of this court, under the oath of the party who may claim to be so authorized, and that all instructions to continue or discontinue the same should be so produced and filed, and that upon default in the premises, or the absence of authority to commence, or to continue this suit, that the same be dismissed with costs, or such other relief as may be just.

This motion was based upon an affidavit, stating, that since this action was brought the plaintiffs had caused another action to be brought against him in the Republic of Mexico, where the same was now depending; and stating also that the defendant "has reason to believe, and does believe, that this suit is prosecuted against him without authority from the said Republic, and that, should judgment be rendered here in his

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\* Compare the ninety-nine Plaintiffs *v.* Vanderbilt, *ante* 193.

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behalf, the same will be for this reason repudiated by said Republic."

This motion was opposed upon the proceedings that have been had in the action, and the affidavit of the Mexican Minister resident at Washington..

That affidavit stated that the minister had received the order of his government, to demand the sum so retained, and to prosecute the same by suit, and that this action is brought under such orders.

*John Anthon*, for the motion.

*Daniel Lord*, opposed.

BOSWORTH, J.—When a respectable and responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not. (*Denton a. Noyes*, 6 *Johns. R.* 296).

Where no circumstances are shown calculated to raise a suspicion of fraud, or of an attempt to impose upon a party, or to abuse or pervert the process of the court, even the mere fact of authority will not be investigated. In this case, the fact of actual authority having been given is sworn to. The position of the party in respect to the plaintiffs, and to the defendant in this transaction, by whom the authority was given, and by whose orders the action was brought, is such as to repel all suspicion or presumption that no such authority has been given as he swears he has received.

There is nothing opposed to the positive affidavit of the Minister Plenipotentiary of the Republic of Mexico but the affidavit of the defendant, that "he has reason to believe, and does believe, that this suit is prosecuted against him without authority from the said Republic. No fact is stated as the basis of his belief, nor are any of the "reasons" of the belief mentioned.

Whether the court would require evidence of the authority to be filed before entry of the judgment, or at the time of entering it, as a greater protection to the defendant, it is unnecessary to decide now. No facts are stated to render it the duty of the court to require it to be filed, in the present state of the action.

No satisfactory reason is assigned for requiring any instructions, that may have been given as to *continuing* or *discontinuing* the action, to be filed. To make such an order would be equivalent to requiring an attorney to disclose the orders given him, as to the conduct of the suit, and the contingencies on which he should abandon it.

No authority is cited in support of such practice, and an attempt of the court to interfere in that manner with the ordinary course of litigation, would naturally be viewed with some surprise.

The mere fact of the commencement of an action in another State after this was brought, and its pendency, is no reason for ordering this to be discontinued. It is not averred that the defendant has been personally served with process in that action, or that he has even appeared in it.

It is not averred that he has been *arrested* in it, or that any of his property has been attached by any proceedings taken in it, or that he has any that can be reached by any proceedings that can be taken in it.

If a judgment should be rendered in that action by which the rights of the parties would be concluded, before the one pending here is tried, this court would permit the judgment there to be plead *puis darrein continuance*, or by supplemental answer.

If the two suits should proceed, *pari passu* to judgment and execution, it would order the one recovered here satisfied on payment of the one recovered in Mexico.

• So it would make any order proper and adequate to protect the defendant, on a state of facts being presented, that called for its interference.

Nothing is shown on this motion, rendering it necessary or expedient for the court to now make any order interfering with the ordinary modes of procedure in such an action. The motion must therefore be denied, with \$7 costs.



DAVIS *v.* KINNEY.*New York Superior Court; Special Term, May, 1855.*

## STATUTE OF LIMITATIONS.—BANKRUPTCY.

Where one of several partners who while out of the State, contracted a debt to creditors within the State, came here and procured a discharge under the bankrupt act of 1841, and afterwards, and more than six years after the contracting of the debt, his co-partner came into the State and was sued upon the indebtedness.—*Held* that the statute of limitations was no bar to the action.

Trial by the court, without a jury.

This action was brought by Davis and others, against Henry L. Kinney and Daniel J. Townsend, to recover for goods sold and delivered in 1837.

The plaintiffs at that time were partners in business, in New York city, and the defendants were partners in business in Peru, Illinois. The defendants in 1837 purchased goods of the plaintiffs to the amount of \$7000, which were never paid for.

In 1840, the defendant, Townsend, came to this State, and here took the benefit of the bankrupt act. The defendant, Kinney, came to the State for the first time in 1855, when this suit was at once commenced against him.

Each of the defendants plead the statute of limitations, and Townsend also set up his discharge. The plaintiff was allowed to discontinue as against Townsend, without costs. The issues between the plaintiffs and Kinney were tried before Campbell J., without a jury.

*J. N. Balestier*, for plaintiffs.

*S. C. Reid*, for defendant, Kinney.

*F. A. Lane*, for defendant, Townsend.

CAMPBELL, J.—In this case the statute of limitations was interposed by both defendants, and a discharge under the bankrupt act by the defendant, Townsend. On the motion of

the counsel for the plaintiffs, he was allowed to discontinue the action against Townsend, without costs.

It appeared on the trial that the defendants, who were co-partners, purchased of the plaintiffs in this city, in the year 1837, goods in value to between seven and eight thousand dollars. At that time the defendants resided and carried on business at Peru, in the State of Illinois. The defendant, Kinney, from the time of the purchase of the goods, never came into the State of New York, till the time of the commencement of this suit. About the year 1840, the defendant, Townsend, came into the western part of the State, and after a residence of about eighteen months, he was discharged under the bankrupt act of 1841.

Under such a state of facts, is the statute of limitations a bar to the recovery against the defendant, Kinney? I think clearly not. The return of the defendant, Townsend, to this State, did not set the statute running in favor of the other defendant.

The case of *Brown vs. Delafield*, 1 *Denio*, 445, cited by defendant's counsel, does not sustain the position taken by him. In that case, to a plea of the statute interposed by the defendants, the plaintiffs replied that one of the defendants had been absent from the State. On a demurrer to that replication, the court said it was bad. The statute was a bar to the action against the resident defendant, as he might have been sued at any time, and a judgment taken against him, and also a judgment against the non-resident debtor, under the joint debtor act. The court observes: "On the return of the absent defendant, a non-resident defendant, an action of debt might be brought on the judgment, and then, in such case, the resident defendant could not have pleaded the statute of limitations; and should the one who had been absent, interpose that defence, a replication like the one before the court would furnish a sufficient answer to it." In other words, in this very case, a replication that defendant, Kinney, had been continuously out of the State since the time the action accrued, would have been held good.

I am further of opinion that even if the statute had commenced to run by reason of the return of the defendant, Town-

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Jones v. Palmer.

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send, into the State, that then, when Townsend was discharged under the bankrupt act, the statute would cease to run as against the other absent defendant. After his discharge, which would be a bar to the recovery of a judgment against him, there would be no mode of recovering a judgment against the other defendant under the joint debtor act. The plaintiffs are entitled to judgment for \$14,106 37, being the amount agreed upon, if defendant was liable. .

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JONES v. PALMER.

*Supreme Court, First District; Special Term, May, 1855.*

A plaintiff may in some cases be allowed to set up one cause of action in two different counts.

Motion to strike out one of the counts of a complaint.

The complaint in this action contained two counts. The first averred an agreement to deliver to defendant certain merchandise, and that defendant agreed to send to plaintiffs certain other merchandise therefor; that plaintiffs performed their part of the agreement, but that defendant did not deliver as agreed, and had not paid for the merchandise delivered by plaintiffs; stating its value.

The second count averred a sale and delivery of the same merchandise for a sum certain, on request of defendant, and non-payment. The claim for judgment was for this amount.

C. M. Hall for the motion,—read affidavits to show that there was but one cause of action stated in two forms, and claimed that one count was redundant and irregular, and that such a mode of pleading, since the Code, was unauthorized. He cited *Churchill v. Churchill*, 9 How. Pr. Rep., 552, and *Stockbridge Iron Co. v. Mellen*, 5 Ib., 439.

A. Cardoso, opposed.

COWLES, J.—Upon consultation with my brethren, now at general term, we agree that the motion should be denied.

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Dusenberry *a.* Woodward.

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The defendant, under the amendment to § 142 of the Code, providing that the facts shall be stated without "unnecessary repetition," may now, as we think, set them out in two separate forms, provided there is a fair and reasonable doubt of his ability to safely plead them in one mode only. But such pleading will be allowed with great caution, and only where it is very clear that the nature of the case renders it proper and necessary to protect the rights of the plaintiff, and secure him against the danger of a non-suit, on the trial. The motion is denied, without costs to either party. Defendant to have ten days to answer.

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DUSENBERRY *a.* WOODWARD.

*New York Superior Court, General Term; March, 1855.*

ADMISSION OF PART OF PLAINTIFF'S CLAIM.—COMMITTAL.

That the defendant offered to let plaintiff take judgment for a sum admitted in the answer to be due, which offer plaintiff declined, is no reason for denying plaintiff's motion that defendant pay into court the sum admitted to be due.

Sect. 385 of the Code, providing that the defendant may offer to permit the plaintiff to take judgment, was intended of a compromise, and does not profess to govern the case of a portion of a demand admitted in a pleading, which pleading raises an actual litigation as to other parts of the claim.

The case of *Smith a. Knapp*, (4 *Sandf.* 711), examined, and its weight as authority qualified.

The history of the practice of punishments as for contempts reviewed.

Before the Code, an interlocutory order for the payment of money admitted to be due in an answer, and which would be enforced by commitment, would in general be granted only to enforce payment of moneys received or withheld in violation of a trust, and not of an ordinary debt.

Under the Code, the same rule exists, and an order to pay money admitted to be due in a fiduciary capacity, so that under § 179 of the Code, defendant might be arrested at any time in the action, may be enforced by commitment.

The cases of *Meyers a. Trimble*, (*ante* 220 and 399), and *Merritt a. Thompson*, (*ante* 223), dissented from.

Where upon liquidation of a partnership concern, one partner receives assets and expressly admits that a certain sum is due to his copartner, he will be treated as holding it in the character of agent or trustee.

But where the partnership of D. and W. was dissolved in January, and D. bought out W.'s share, leaving the title of certain lands in W., as security for purchase money, and in July a new contract was formed providing that W. should

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take at an appraisal the lands he had held as security, deduct his claim and pay over the balance, *Held*, that the balance admitted by him, after appraisal, was not held in a fiduciary capacity, and he was not liable to arrest by way of enforcing an interlocutory order for its payment.

Appeal from order that defendant pay into court a part of plaintiff's claim, which he admitted in his answer to be due.

The answer of the defendant in this case, admitted a part of plaintiff's claim, and the plaintiff thereupon obtained an order at special term, directing him to pay into court the sum of \$4222 47, with interest from the date of the order, or (upon giving security for the sum of \$876 65, in the manner specified), to deduct that amount from the above sum, and pay in the balance only. There are other provisions of the order not necessary to be noticed. The order was made under the 244th section of the Code, upon the ground of an admission in the answer of part of the plaintiff's claim being just.

*Mr. Dana*, for defendant. Sec. 244 of the Code, applies only to a claim which is unconditionally admitted. (4 *Sand.* 673).

It was not intended to change the means of enforcing payment of a money demand, and the admission of a part cannot give the plaintiff any greater right than he would have if the whole cause of action were admitted. The facts of the case show that the defendant should not be treated as holding the funds in a fiduciary capacity.

There is no equitable claim to the exercise of unusual power by the court.

The former decision of the court, in 4 *Sandf.* 711, should be conclusive. The same decision has been reiterated in *Ryder v. The Union India Rubber Company*,\* not reported.

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\* The decision alluded to as the case of *Ryder v. The Union India Rubber Company*, was rendered at General Term of the Superior Court, held by Oakley, Ch. J. Duer, Hoffman, and Bosworth, J. J., 23d December, 1854. The substance of the opinion was as follows:—

The complaint in this suit contained two distinct causes of action. One for goods sold and delivered—the other for the recovery of money received for goods sold and delivered. An offer was made by the defendants previously to the answer to allow judgment for a sum greater than was claimed in the first count. This offer was not accepted, and an answer having been put in, the case now comes before the

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*Mr. J. Burrill, Jr.*, for plaintiff. I. The answer admitted that there was due to the plaintiff the sum of \$3848 03, with interest from February 25, 1853; and the plaintiff was entitled under sect. 244 of the Code to an order directing the defendant to satisfy that part of the plaintiff's demand. *Code*, § 244, *Roberts v. Law*, 4 *Sand.* 56, 642.

II. The principle claimed to be established by "*Smith a. Knapp*," 4 *Sand.* 711, that the order will not be granted when an order made before answer, has been refused, is unsound.

1. If the order is accepted, the plaintiff will be entitled to judgment, and will not require the aid of § 244.

2. If the effect of rejecting an offer, be to deprive the plaintiff of this legal right and to secure a benefit to defendant, it is coercing the plaintiff into an acceptance of less than is justly due, and rewarding the dishonest debtor.

III. The offer differs widely from an admission in the answer. *Code*, § 385. If the offer be unaccepted, it is deemed withdrawn. It is a conditional *cognovit*. The admission in the answer of the justice of a portion of the plaintiff's claim, terminates all litigation as to that portion, and can be used against the defendant in all stages of the action.

IV. The practice of compelling the payment of money into court, when a sum was admitted to be due, was well settled in the Court of Chancery, and the Code has merely confirmed the practice, by legislative enactment, and extended its application. *Clarkson a. De Peyster*, *Hopk.* 274. *Mills a. Hansen*, 8 *Vesey*, 68. 1 *Barbour's Ch. Prac.* 237. 3 *Daniel's Ch. Prac.* 467.

V. The objection that the order should not be granted, because the mode of enforcing it is difficult or doubtful, ought not to have any weight.

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court on motion, under section 244 of the Code, which provides that when the answer of the defendant admits part of the plaintiff's claim to be just, the court on motion may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a provisional remedy. The court denied the motion without costs, remarking that this question in a precisely similar case, (*Smith v. Olesen*, 4 *Sandford Sup. Ct.*, 711), had already been determined by the court, and that while the mode of enforcing such an order is unsettled, the court would under such circumstances, leave the plaintiff to his ordinary and ascertained remedies.

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1. If the plaintiff has brought himself within the Code, he is entitled to his order.

2. If the order cannot be enforced, the granting it, will not injure the defendant.

3. The question as to the mode of enforcing it, does not arise.

VI. But there is no difficulty in enforcing the order.

1. The Code says it may be enforced as a *provisional remedy*. (*Code*, § 244.)

2. It may, perhaps, be enforced by execution, regarding the order as a species of judgment.

3. If not capable of being enforced by execution, it comes within the provisions of the statute relating to contempts, which provisions are still in force. (1 *Duer*, 512; 2 *Rev. Stats.* 534, § 1, *Subd.* 3.)

4. It is discretionary with the court to punish the disobedience of such an order, as a contempt, and this discretion will protect the party against any abuse of the power.

5. Even if after the attachment issued, the court were satisfied that the party could not comply with the order, they would release him from the order. (*Laws* 1843.)

VII. The facts of the case show that the money is due from the defendant to the plaintiff, in the capacity of trustee.

BY THE COURT, HOFFMAN, J.—The action is to adjust and recover an amount alleged to be due to the plaintiff from the defendant, upon the winding up of a certain joint concern relating to a general law and commercial agency, and the purchasing and selling lands.

The plaintiff claims a balance of \$4593 to be due to him.

The answer was served on the 7th day of May, 1853, and it was therein admitted that there was a balance due to the plaintiff, of \$3848.

Accompanying this answer was a written offer that the plaintiff might take judgment for that amount, with interest from the 23d of January, 1853, and costs, pursuant to section 385 of the Code.

This offer was not accepted, and an order of reference was made, which is now in progress of execution.

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Dusenberry v. Woodward.

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The plaintiff now moves for an order that the amount admitted in the answer to be due shall be paid into court, to satisfy part of the demand of the plaintiff, under the 244th section of the Code.

It is objected, that no such motion can be made after an offer to allow judgment has been made under the 385th section of the Code. To support this objection, the case of *Smith v. Knapp* (4 *Sandf. Rep.*, 711), is referred to.

In that case the defendant, before answering, made an offer, under the 385th section, to allow judgment to be taken for the sum which he afterwards by answer admitted to be due. Then the motion was made to compel him to satisfy the amount he admitted to be due. The court held that it possessed the discretionary power to refuse the application after an implied waiver by the plaintiff; that the case was one in which it was proper to exercise such discretion, and especially while the remedy to enforce it was not clearly settled under the then late amendment of the 244th section, made in 1851.

The court has now been called upon to pass upon the effect of that section as amended, so far at least as the present application is concerned, and has given it much attention.

The 385th section provides for a judgment after action, and before trial or verdict. An offer in writing is to be made to allow judgment for the sum, or property, or to the effect specified. If it is accepted within ten days, the summons, complaint and offer are to be filed, and the clerk must enter judgment accordingly. Here there is an end of the action. If not accepted, *the offer is to be deemed withdrawn, and cannot be given in evidence.* Of course it cannot be used to affect the defendant in his defence. It is indeed under the Code, as if it had never been made, except to settle the question of costs. If a less favorable judgment is obtained by the plaintiff, he pays costs from the time of the offer. In *Scheidner v. Jacobi*, in this court (1 *Duer*, 694), ninety-three cents made the costs to fall upon the plaintiff.

It seems clear that this section was intended to promote and regulate a compromise after action commenced, and did not contemplate the case of an admission, by answer or otherwise, of a sum specified, or any other sum being due, and a certain



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litigation as to other parts of the demand. It does not speak of a sum as admitted. It is an offer to allow judgment to be taken for a certain sum, and it is treated by Justice Cady (7 *How. Pr. R.* 456), as the *cognovit actionem* of the old practice, in a modified form. It becomes substantially such if accepted, and can be made, and is in practice frequently made, the means of attaining the same objects. But certainly it does not profess to govern the case of a portion of a demand admitted in a pleading, which pleading raises an actual litigation as to other parts of the claim.

It is obvious that if a case is presented of an admission in an answer, that part of a sum demanded is due without any offer to allow judgment, the question as to the mode of enforcing an order must arise.

The provisions of the Code which bear upon the subject are the following:—The 178th section provides that no person shall be arrested in a civil action except as prescribed by that act; but this provision shall not affect the act to abolish imprisonment for debt, passed April 26th, 1831, or any act amending the same; nor shall it apply to proceedings for contempt. This section remains unchanged from the original enactment in 1848. (*See 1 Code R., N. S.* 210. 6 *How. Pr. R.*, 241).

By the 302d section as amended in 1851, in all cases of commitment under this chapter, (that relating to supplementary proceedings) or the act to abolish imprisonment for debt, the person committed, may in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or by the court in which the judgment was rendered, on such terms as may be just.

By the Code of 1848, as amended in 1849, the 244th section directed, that, until the legislature should otherwise provide, the court may appoint receivers, or direct the deposit of money or other things, and grant the other provisional remedies now existing according to the present practice, except as otherwise provided in that act.

And the provisions of the Revised Statutes, "of proceedings as for contempts," being left in full force by section 471 of the

Code, (see *The People v. Compton*, 1 *Duer*, 512), the result is, that until the amendment of section 244, made in 1851, the proceeding to enforce payment of a sum of money or of costs ordered to be paid before final judgment, was regulated by the previous law and practice.

What was that law and practice?

1st. That orders for the payment of money into court were by the rule of the English Court of Chancery and of our own, enforced by process of commitment for contempt. (2 *Daniel's Pr.* 1653. *Needham v. Needham*, 1 *Hare*, 633. *Crawley v. Crawley*, 3 *Br. C. Rep.*; and *anon.* in the Exchequer, 2 *Flowler's Pr.* 207).

2d. That such interlocutory order was only made in cases of the money being received by persons in a fiduciary capacity, or being held in trust, as by executors. If the money demand was in the nature of a debt, the court would not interpose until the hearing. (*Peacham v. Daw*, 6 *Mod. Rep.* 98. *Lee v. Macauley*, 1 *Y. and Col.* 207. *Blake v. Blake*, 2 *Sch. and Lefroy*, 26. *Lester v. Donald*, 1 *Jack. Walk.* 253. And particularly *Richardson v. The Bank of England*, 4 *Mylne and Craig*, 174.) *Haggerty v. Duane*, 1 *Paige*, 321, was a case of admission of money in hand by a trustee. *Clarkson v. De Peyster*, 1 *Hopkins*, 374, was that of a guardian defendant.

Although the mode of enforcing an order in England was the same as for enforcing a decree by process for contempt ending in a sequestration, this distinction as to the cases in which money would be ordered to be paid in, was of great moment, under our statutes and rules.

4th. The act of February 2d, 1802, (session 25, cap. 15,) gave power to the Court of Chancery to enforce its decrees by execution, either against the body of the person who shall be bound to perform the same, or against his goods and chattels, and in default thereof, against the lands and tenements of such person, to be in such form as the court should from time to time direct. This act was renewed in section 4 of the revision of 1813, (*Vol. 1, p. 437*), with the additional provision that no goods, or chattels, lands, or tenements, should be bound as against an innocent *bona fide* purchaser, without notice, until an actual levy or seizure made there-

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upon. The Revised Statutes of 1830 contained the same provision with some modifications. (2 *R. S.* 183, § 110, 111, 2d. ed.) *First*, no *process* should be issued on *any final decree*, until the same should have been enrolled as therein provided. *Second*, until an actual levy, no goods or chattels should be bound by execution as against a purchaser without notice. Lands and tenements were omitted. The statute had provided a system of enrolment and docketing decrees, in order to create a lien upon lands similar to that of judgments, which did not exist before.

5th. It is clear, that if a case was ready for hearing, upon bill, and answer or otherwise, as in *Peacham vs. Dorr*, (6 *Mod.* 98), or *Gilbert vs. Colt*, (1 *Hoffman's Pr.* 323), and there had been an admission of a certain amount due by the accounting party, the decree to account could have ordered payment of that sum into court, while it directed the adjudication of contested matters by a reference or an issue. And the court could issue an execution to compel performance under the statute.

That statute, from its first enactment, spoke of decrees, not final decrees. The revised act of 1830, requires enrolment of a final decree before process. If enrolment had been necessary, a decree for an account, and many mere orders were capable of enrolment, and there might be a succession of enrolments.

*Minthorne's Executors v. Tompkins*, (2 *Paige*, 102), was the case of an enrolment of a decree of dismissal of a bill as to one party; and it was held that a subsequent decree as to other parties could be made by a continuance on the record. *McGregor v. Popham*, (4 *Hare*, 162), was a case of an order refusing a new trial being enrolled. See also *McDermott v. Kirby*, (1 *Phillips*, 208), as to enrolling decrees for an account, and *Daniels' Practice*, Vol. 3, p. 1000, &c.

In *Poillon v. Houghton*, (2 *Sand. S. C. Rep.*, 649, June, 1849), an order had been made in an equity suit overruling a demurrer with costs, and liberty to answer. A precept issued to collect the amount out of the goods and chattels. The court observed that before the act of November, 1847, such an order would have been enforced by process of contempt, but the sum is now to be collected by process in the nature of an

execution against personal property. That the provisions of the Revised Statutes requiring an enrolment before execution, and the consequent rule of the Supreme Court, (the 77th), related to final decrees only. The order in question was purely interlocutory, so that no enrolment was necessary. The costs when taxed under the present law constituted a judgment, which was due and payable like any other judgment in a court of record. (See also *McGrath v. Van Wyck*, 3 *Sand.*, 750).

By the statute (of proceedings as for contempt) the court had power to punish by fine or imprisonment, or either, any neglect, or violation of duty in the cases enumerated. Parties to suits, and all other persons, for the non-payment of any sum of money ordered by such court to be placed, in "cases where by law execution cannot be awarded for the collection of such sum." (2 *R. S.*, 584, § 1, *sub.* 3).

The 4th section of the same statute provided, that when any rule or order of a court shall have been made for the payment of costs, or any other sum of money, and proof by affidavit shall be made of personal demand of such sum of money, and a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison, until such sum and the costs and expenses of the proceedings shall be paid.

These several provisions being read together, and in connection with the third section, it seems manifest, that the precept and imprisonment for non-payment of a sum of money other than costs ordered to be paid, could only be permitted where execution could not be awarded for the collection of the sum.

In *Brockway v. Copp*, (2 *Paige*, 578, *Oct.* 1831), there was an appeal from an interlocutory order of a vice chancellor, refusing to modify an injunction. On appeal, the order was reversed, and the complainants ordered to pay the costs of the appeal. The chancellor said, "I have no doubt that this court, on an appeal from an interlocutory decision of a vice chancellor, may make a decree respecting the costs on such appeal, which will authorize the party to enrol the same, and to take out execution against the person, or the property of the party against whom such costs are adjudged. (See 2 *R. S.* 613, § 2). Such indeed is the practice of this court in relation

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to costs awarded in the Court of Errors, on appeal from interlocutory orders of the chancellor. The decree of the appellate court in such cases, is a final decree, so far as respects the costs awarded on the appeal, and those costs may be collected on an execution in the usual manner." He adverts then to the right of the party to proceed by attachment as for a contempt, and adds, "I conclude, therefore, that it was optional with the appellant in this case to have the decree of the chancellor, awarding costs on the appeal, enrolled, and to take out a *fieri facias*, or *capias ad satisfaciendum* thereon, or to apply for a precept to commit the party to prison until the costs were paid."

Under this decision, there was then a concurrent remedy by execution or commitment in cases of orders to pay costs, under the fourth section. And under the third, either the remedy was exclusively by execution when it could be awarded by law, or was also concurrent in cases of money directed to be paid, other than costs.

On the 26th of April, 1831, the act to abolish imprisonment for debt was passed. After some contrariety of decisions, (4 *Paige*, 347, 12 *Wendell*, 220, 3 *Edwards*, 313), the chancellor in the last case before him, (*Hosack v. Rogers*, 11 *Paige*, 603), held, that no attachment could issue to enforce payment of money decreed to be paid, by a final decree. The remedy was by execution. That the remedy by process of contempt was not abolished. That it would be improper, however, for the court to evade the non-imprisonment act, by resorting to attachment, or a precept to commit, on a decree for payment of money only. The case might be different had it been a mere interlocutory order of the court, directing a justice who admitted trust funds to be actually in his possession, or under his control, to bring the same into court. The reservation in the second section of the non-imprisonment act would probably extend to such a case."

In this connection the case of *Van Wezell v. Van Wezell*, (1 *Edws.* 113, and 3 *Paige*, 38), may be referred to, particularly for the valuable opinion of the vice chancellor, upon the construction of the English act, and of our own statute, as to voluntary assignments, (2 *R. S.* 31), showing how fully process of

attachment for non-payment of money was regarded as of the nature of an execution. (See also the case of *M. Williams*, a bankrupt, 1 *Sch. & Lef.*, 174, and anon 2 *Fowler's Exchq. Prac.* 107).

By an act of the 31st of January, 1843, (*Sess. Laws*, ch. 9), the 20th section of the statute as to contempts, was amended, and contained a provision that in all cases which had arisen, or might thereafter arise, under the provisions of the title, the court or tribunal which ordered such imprisonment, might, in their discretion, (in cases of inability to perform the requirements imposed), relieve the persons so imprisoned in such manner, and upon such terms, as they shall deem just and proper.

So far as the process for collection of costs was concerned, the statute of 24th of November, 1847, (ch. 390), provided that no person should be imprisoned for the non-payment of interlocutory costs, or for contempt of court in not paying costs, (with certain exceptions); but process in the nature of a *feri facias* against personal property, might be issued for the collection of costs founded on such order of court.

It may then be assumed that prior to the Code, the law in our State upon this subject stood thus.

The interlocutory order for the payment of money admitted to be due in an answer, which would be enforced by process of commitment and imprisonment, would in general be only granted in cases of money received or withheld in violation of a trust. The character of trust moneys must have been impressed upon them.

Where the admission was of money due as a debt merely in its general acceptance, the party was obliged to wait until he could bring on the cause to a hearing. When so brought on, a decree could be made for payment. Even if this was an interlocutory decree as for an account, and other matters remained to be adjudged in the cause, the direction for payment could be enforced by an execution. No enrolment was necessary for an execution in such a case. If it were necessary, the practice allowed it to be made.

The imprisonment upon process for collection of costs, was abolished by the act of 1847, and a *feri facias* against personal

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Dusenberry & Woodward.

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property substituted. In a few accepted cases, such process was retained.

Before the act of 1843, a party imprisoned, as a trustee for example, for disobedience to an order for payment of money other than costs, (as well as in a case for costs), could obtain the benefit of a discharge, if he could be brought under the provisions of the statute as to voluntary assignments by a debtor imprisoned on execution. And under this act of January 31, 1843, the court might relieve a party imprisoned for non-payment of money, or for any contempt of any description whatever, upon such terms as should be deemed proper. I have before observed that the Code, until 1851, left these laws and process in full force.

What is the operation of the Code as amended in 1851, upon these provisions and rules?

The provisions of the 244th section may be thus analyzed.

There must be an admission, on a pleading or examination, of possession or control of the thing demanded. That must be money or some other thing capable of delivery. It must be held by the party as trustee for another, or belong or be due to another. Then the court may order the same to be deposited in court, or delivered to the party, with or without security, subject to its further direction.

This provision refers to a thing capable of substantial possession and delivery; and I apprehend the term *money* is here used in the old legal acceptation, as old as the days of Lord Coke, viz., gold and silver, or the lawful circulating medium of the country. (*Mann v. Mann*, 1 *Johns. Ch. R.*, 236). This part of the section must mean money identified and set apart, as if it were in a bag.

This construction is rendered more clear by the next provision of the section. When the court shall have ordered the deposit of money, it may, besides punishing the disobedience as for contempt, make an order requiring the sheriff to take the money, and deposit or deliver it according to the direction of the court.

The case of an order to pay money into court must depend upon the last clause of this section, if it is at all covered by it. It is provided, that when the answer of the defendant admits

part of the plaintiff's claim to be just, the court on motion may order such defendant to satisfy that part of the claim, and *may* enforce the order as it enforces a provisional remedy.

The 468th section of the Code provides that all statutory provisions inconsistent with the act are repealed. By the 471st section all existing statutory provisions relating to actions not inconsistent with the act and in substance applicable to the actions therein provided, are retained in force; and by section 469 the present rules and practice of the courts in civil actions, when consistent with the act, are to continue in force, subject to the revision of the courts.

There does not appear to be any inconsistency between this portion of the 244th section and these provisions. The language is not imperative, but implies a discretion. It may be well construed to mean, that when an answer has admitted such a claim as would formerly have been enforced by process of contempt, it may be so enforced now; and when the admission is of such a character as that enforcement could only be by execution, an execution must be resorted to; and if that cannot be had until final judgment, the party must wait until he has obtained it.

The other construction contended for is, that it covers cases of every character, so that in an action on two promissory notes, if one is admitted to be due, and the other contested, such an order resulting in imprisonment might be made, and the anomaly presented of a committal upon intermediate process for a demand, when if the case had gone to judgment, such process would be illegal.

The judges of this court cannot give such a construction to this clause. They decide as far as this:—That the court may on motion, under the last clause of the 244th section, order money to be paid to the plaintiff, or into court, which is expressly admitted to be due from the party, and may enforce the order by process of committal, in cases where the money has been received, or is held, in a fiduciary capacity, so that as to such demand, an order or arrest could have been made under the 179th section of the Code—such was the case of *Buchans v. Carey*, (4 *Sand.*, S. Ct., 706-7). When the defendant is in such a fiduciary situation, he can be arrested at any time



before judgment; and execution may finally be had against his person. (§ 288).

We have had the opportunity of perusing several of the opinions of the judges on two cases in the Court of Common Pleas, the one at special and the other at general term—*Meyers v. Trimble*, (1 *Abbotts' Pr. R.*, 220, 399), and *Merritt v. Thompson*. (*Ib.* 223). In the former, the action was on a promissory note. The defendant alleged a set-off as to part of the demand, and admitted the residue to be due—and the order for payment of that part was made—an attachment was directed to issue upon disobedience, and an appeal was taken to the general term from such order. The order was affirmed.

The view which the learned judges took of the Code was this: that the provision in question could be reconciled with the continued force of the act abolishing imprisonment for debt in this way—that if it appear that the debtor is unable to pay the sum ordered to be paid, that may be deemed a sufficient excuse, when he appears to answer for apparent contumacy.

This view leads to the conclusion that a discrimination is to be made between the parties whose poverty is established, and those who are in affluent circumstances. The latter, when his property is so situated as not to be reached by an execution at law, could not be imprisoned upon a judgment for the identical debt, for non-payment of part of which he may be imprisoned on this proceeding. Undoubtedly the non-imprisonment act contains no such difference, while by construing the Code as we have done, consistency is reached with the law of a Court of Equity, as it existed before, and with the provision in the same title relating to arrests.

The remaining question is, whether the case falls within this description—and upon a careful examination of the facts and authorities, we consider that the judge at special term fell into an error, in making the order for payment which is appealed from.

It need not be disputed that where a partnership is dissolved, and one of the partners, by tacit permission, or express agreement, winds up the affairs, and receives the assets; and then expressly admits, that upon liquidation of the accounts a given sum belongs to his co-partner, he should be treated as

holding the same in the character of agent or trustee. This was substantially the case of *Roberts v. Law*, (4 *Sandf.* 642). That of *Coursen v. Hamlin*, (2 *Duer*, 513), was similar. The order at special term directing the payment was indeed reversed by the general term, but upon the ground that the admission in the answer was not sufficiently explicit. The case of *Mills v. Hanson*, (8 *Vesey*, 68), was also one of a partnership.

But without an express admission to this effect, a partner collecting in the funds cannot be subjected to such a motion. (*Foster v. Donald*, *Jacobs' R.* 252; *Richardson v. The Bank of England*, 4 *M. & Craig*, 165).

The English cases upon the whole subject are well collected and discussed in *Daniel's Practice*, 1636-1644.

But in the present case, the partnership was dissolved on the 10th of January, 1851; the defendant then retired from the business, and sold out his interest to the plaintiff for the sum of \$16,500, with interest. The plaintiff was to continue the business, taking the whole property except that certain real estate was to be held by the defendant as security for the purchase money, and until it was paid, when he was to transfer the same to the plaintiff.

In July, 1851, a new agreement was entered into between the parties, by which the lands and contracts held by him as security were to be taken by him in settlement upon an appraisement; the deficiency to be made good by the plaintiff, and any excess of value to be paid by the defendant; the plaintiff to pay the taxes and incumbrances, and guarantee the validity of the titles to the lands.

The appraisal was made according to this agreement, and the plaintiff in this complaint, after stating this amount, an amount due upon the contract taken as cash, and a sum received by the defendant from the assets, deducts these several amounts from the purchase money, and claims a balance due of \$4594 63.

The defendant in his answer admits that such balance is the sum of \$3848 03. In the affidavit produced by the defendant in opposition to this motion, he claims only a reduction from this admitted sum of \$492 33, the sum of \$376 05, on ac-

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Jones v. Derby.

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count of the failure of the title of a parcel of the land, and the balance paid for taxes paid by him.

We are of opinion that the relation of partners between the plaintiff and defendant was, by the operation of these agreements, terminated and annulled. Their rights and liabilities were to be determined by the contracts, and these finally left the plaintiff a creditor of the defendant under the sealed contract of July, 1851, for the excess of the lands and contracts, and sums received by the defendant, over the purchase money of the joint concern.

In this view, then, the relation of mere debtor and creditor exists between them. There is nothing of an agency, a trust, or a fiduciary character in any sense subsisting.

For these reasons we think the order was wrong, and must be reversed.

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JONES v. DERBY.

*Supreme Court, First District; General Term, April, 1855.*

SERVICE OF PROCESS.—RESIDENCE.

Judgment and execution will be set aside where, under the "Act to facilitate the Service of Process in certain cases," (*Laws of 1853, chap. 511*), service of summons was made at the defendant's residence and place of business, New York, while the plaintiff knew he was absent in California on business.

Motion to set aside judgment.

The facts sufficiently appear in the opinion.

MORRIS, J.—The evidence in this case shows that defendant's residence and place of business was in the city of New York, and it was so known to the plaintiff at the time the summons was served at his place of residence, and that it was also known that defendant was then in California on business. The plaintiff's affidavits, upon which the order to serve the summons was granted, shows all these facts.

The act entitled "an act to facilitate the service of process in certain cases," does not apply to the present case. In this

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The People *a.* Donnelly.

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case there is no evidence that the defendant "cannot be found, or if found, avoids or evades such service."

This question is ably considered by Harris, Justice, in the case of *Collins a. Campfield*, (9 *How. Pr. R.*, 519).

Judgment and execution set aside with costs, and ten dollars costs of this motion.

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THE PEOPLE *a.* DONNELLY.

*Supreme Court, First District ; General Term, February, 1855.*

## EVIDENCE.—TESTIMONY OF CO-DEFENDANT.

Where two are jointly indicted, one is not admissible as witness, either for or against the other, until he has been first acquitted or convicted.

This rule is not on the ground of interest.

Where one co-defendant in an indictment had been examined on the trial, without being previously discharged from the record, a new trial was ordered.

## Motion for a new trial.

The defendant, Donnelly, was indicted jointly with one Beales. On the trial, Beales was called by the prosecution, and admitted as a witness against Donnelly; but objected to, as incompetent. Donnelly was convicted, and thereupon moved for a new trial, on the ground of error, in the admission of Beales' testimony.

*J. B. Phillips*, for the motion.

*A. Oakey Hall*, District Attorney, opposed.

CLERKE, J.—It is well settled, and I believe never questioned in this State or in England, that where several persons are jointly indicted, one is not a competent witness either for or against the others, without being first acquitted or convicted, and it makes no difference whether the defendants plead jointly or separately. An accomplice, however, separately indicted, is competent. Whether there is any good

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reason for this distinction, it is unnecessary to inquire on the present occasion.

Beales, although a joint defendant, was admitted as a witness against Donnelly in this case, without discharging him from the record.

The judgment should be reversed, and a new trial ordered.

MITCHELL, J.—In *Rex vs. Rowland* (1 *Ryan and Moody*, 401), the counsel for the crown moved to have an acquittal against two of the defendants, that he might use them as witnesses. It was treated as necessary and allowed, (and see the note there).

So a case is stated in *Cases Temp. Hardwicke*, 163, where on an information at the suit of the crown it was deemed necessary to enter a *nolle prosequi* against one of the defendants, upon examining him against the others.

Our own courts have decided, that one of the defendants in an indictment cannot be a witness for another. This cannot be upon the ground of interest; for there is no interest either way; and if it be because he is a party to the record, it applies, whether he be called for the people or his co-defendant.

Judgment should be reversed, and new trial ordered.

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#### TRACY & TALMADGE.

*Supreme Court, First District; General Term, May, 1855.*

#### GENERAL AND SPECIAL TERM.—RECEIVERS.

There is but one Supreme Court, whether the judges holding it be at general or special term, and powers conferred by statute may be exercised by the court at either term, unless there be some statute specially restricting the power of the court. Where, under an order of special term, that the report of referee be confirmed, unless cause to the contrary be shown within eight days, a party filed exceptions to the referee's finding, and an order was entered that all the proofs and testimony taken before the referee come before the court on the hearing of the exceptions, and the cause was placed on the general term calendar for hearing, a motion that it be struck off, on the ground that it should be heard in the first instance at special term, was denied.

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The motion to set aside the report of the referees might properly be made, either at special or general term, according to convenience.

A receiver appointed in an action commenced in Chancery and continued in the Supreme Court in Equity, has the powers and is subject to the obligations and duties declared in *Rev. Stats.* 469, § 68; but a rule appointing referees, to which such receiver gives his assent, should be entered, not in the common law courts, as there required, but in the Court of Equity by which he was appointed, and any appeal from the decision of the referees is to be heard there also.

Motion to strike cause from the calendar.

This action was commenced in Chancery against the North American Trust and Banking Company. A receiver was appointed and a decree made, dissolving the corporation, as insolvent.

Subsequently, the cause being continued in the Supreme Court in Equity, the Bank of Liverpool presented a claim, and an order was entered appointing referees to examine and report concerning the same. Their report was filed in the same court, and the counsel for the claimant filed exceptions to the report, and moved at general term to set it aside.

On the hearing of the motion, although both parties had placed the cause upon the general term calendar, the counsel of the receiver moved to strike it off the calendar, upon the ground that it must first be heard at special term.

*H. P. Dodge*, for receiver.

*Charles Edwards*, for claimants.

MITCHELL, C. J.—An order was made in the above cause by the Chancellor, 31st August, 1841, appointing a receiver of the property of the Bank, and a decree was made by him on 19th June, 1843, dissolving the corporation. The Bank of Liverpool after that presented its claim against the banking company, and an order of this court, sitting in equity, was made 31st January, 1849, appointing referees to examine into the claim, and to report upon the validity and amount thereof to this court, that is, to the same court in equity. The referees made their report on 2d June, 1853, and on the motion of the attorney for the receiver, an order was entered at special term in equity, and under the above title, that the report

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be confirmed, unless cause to the contrary should be shown in eight days. The claimants then filed exceptions, and an order was entered October, 1853, at special term, that all the proofs and testimony taken before the referees come before the court on the hearing of the exceptions, in the shape of a special report of referees, or in the form of a case. All the above orders were made under the above title, and in equity : none of them in the matter of the claim of the Bank of Liverpool *vs.* Leavitt, receiver, as would be proper, if the reference were under the statute as to insolvents.

The cause has been placed on the general term calendar by both parties since the last order was made, and is now reached in its order, and the counsel for the receiver moves to strike it from the calendar, on the ground that it must first be heard at special term.

The constitution does not prescribe what are the respective duties of the special term, and the general term. The judiciary act and the Code in some few instances have directed that certain matters should be heard at the one term, and some at the others ; but neither of those statutes, nor any other statute has laid down any general rule defining the specific duties of the Supreme Court at either of those terms.

By the Code of 1849, it was understood that a bill of exceptions from the circuit could be heard only at the general term, and not at the special. By the amendment made in 1851 (§ 265), motions for a new trial, not only on bills of exceptions but on a special verdict, or case reserved, or case made, were to be heard at the special term only, unless the justice trying the cause should direct it to be heard in the first instance at the general term.

The amendment in 1852 directed these motions to be heard first at the circuit or special term, except that when exceptions were taken, the judge trying the cause might direct the motion to be heard first at the general term—and that when questions of law only were presented by the case made at the trial, the judge trying the cause might make a like order (§ 265). The same rule probably applied to trials by the court under the law of 1851, (§ 268) ; but in 1852, section 268 was so amended that the review was to be at the general term only.

This variableness in the law, and this want of uniformity of purpose at any one time, as to the class of cases to be heard at either term, show that there was never any definite purpose in our legislature that all matters in the nature of an appeal should be first heard at the general term, or that all matters not of that character should be heard at the special term only.

There is but one Supreme Court, whether the judges holding it be at general or special term: and powers which by statute are granted to the Supreme Court, may be exercised by the court at either term, unless there be some statute specially restricting the court. The practice has conformed to this view. The motions to confirm the report of commissioners on opening streets were frequently, if not generally, made at first at the general term, and continued to be so made until the court finding that they occupied too much of the time of the general term, directed them to be heard at special term: and there was some reluctance at first to comply with this order, under the apprehension of counsel that the general term only had jurisdiction of these motions. So the general term has granted a mandamus, and the special term has quashed it, as not containing in its face any cause of action, and so being improvidently issued. If the special term should seem to any to have gone beyond the principle of a rule lately adopted, that the special term shall not open a default entered at the general term, the case shows, what alone is material to this case, the powers of the general term. Writs of error in criminal cases are to be heard before the Supreme Court. (2 *Rev. Stat.*, 741, § 24). They are always heard at general term. When for any reason any convict sentenced to the punishment of death, has not been executed pursuant to sentence, and the same still stands in force, "the Supreme Court" is to cause him to be brought before the court, and if no legal reasons exist against the execution of the sentence, they are to sign the warrant for the execution at some future day. (2 *Rev. Stat.*, 659, §§ 23, 24). Such a case has occurred in this district, and the matter was heard at general term. Motions to set aside the award of arbitrators, and to set aside the report of referees, were always made at the general term, and in the class of enu-



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merated motions, when founded on the merits. The general term, under the old system, had the power to hear this case, and all others of the like kind, and there is no law taking any such power from it; it must therefore remain with it.

The receiver in this case was appointed under sections 40, 41, 42, of 2 *Rev. Stats.*, 464. The last section gives him all the powers and authority conferred, and declares him subject to all the obligations and duties imposed (in Art. 3 of that title, viz. : pt. 3, ch. 8, tit. 4), upon receivers, appointed in case of the voluntary dissolution of a corporation. The title referred to, is 2 *Rev. Stats.*, 469, § 68, and declares that the receiver shall have all the power and authority conferred by law upon trustees, to whom an assignment of the estate of insolvent debtors may be made, pursuant to the provisions of ch. 5 of part 2 of the *Rev. Stats.* The whole of ch. 8, of part 3, of the *Rev. Stats.*, (except titles 2 and 12); and also, ch. 5, of part 2, of the *Rev. Stats.*, are retained by § 471, of the Code. Ch. 5, part 2, of the Revised Statutes (2 *Rev. Stats.*, p. 45, § 19, *etc.*), contains provisions for the reference of claims of creditors of an insolvent, when a controversy arises between such creditors and the trustees of the insolvent, and directs the matter to be referred to those persons who may be agreed upon by the trustees and the opposite party, in writing; or to be selected otherwise, as the act directs. The written agreement (by section 23), is to be filed in the office of the clerk of the Supreme Court, when the trustees were appointed for concealed or non-resident debtors, under Art. 1 of that chapter; or in the court of Common Pleas, when the trustees were appointed under any other article of that title; and a rule was thereupon to be entered, appointing the persons so selected to determine the controversy. Those referees have the same powers and are subject to the like rules and obligations as referees appointed by the Supreme Court, in personal actions; and their report is to be filed in the same office where the rule of their appointment was entered, and is conclusive on the parties, if not set aside by the court. (2 *Rev. Stats.*, 45, §§ 23, 24, 25).

It is doubtful whether these provisions can strictly apply to proceedings under this law. The section last quoted provided for referees only in two cases; one when the trustees were

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appointed under one article of the insolvent law, and the other when they were appointed under the other article of the same law, and requires the referees to be appointed by rule in the common law courts, not in the Court of Chancery; and that they determine the controversy (§ 23). Under those sections it is essential that the trustees enter the rule of reference in the Supreme Court or the Court of Common Pleas, according as they are appointed, under one article of the law, or the other. The receiver is not appointed under either article, and so cannot strictly comply with either. But as the proceeding under which he is appointed, and the analogous ones under which he derives his powers, are both instituted in the Court of Chancery, (2 *Rev. Stats.*, 462, § 31, and 467, § 58, &c.), and he thereby becomes an officer of that court, and amenable to its control, it is fairly to be inferred, that the order for a reference to which he gives his assent is also to be made in the same court; and any appeal or exception to be taken from the decision of the referee is to be heard there also, and according to its rules.

Such was the understanding of those who have heretofore had charge of this cause, and they entered the order of reference in equity and not on the law side of the court, in January, 1849, and filed the report, and entered an order of confirmation *nisi*; and to that report, in due time, the complainant filed his exceptions. The mode of entitling all the papers conforms to this view. It can hardly be doubted, that under the old system the Chancellor and not the Supreme Court or Court of Common Pleas, would be the proper tribunal to hear this matter in controversy.

The slight exposition above made of the respective duties of the special term and general term, show that there is nothing necessarily to prevent the motion to set aside the report of the referees from being heard at either term. It is a matter of convenience only. Here it is understood that both parties mean to go to the Court of Appeals, so that they must come here now or at some other time. If the analogy of the Code is followed, the report of the referees may be considered as so far binding that the only appeal from it is to the general term.

Under the circumstances, it is most convenient to have the case heard at general term, without sending the parties first to the special term. The motion to strike the cause from the calendar is therefore denied.

PHOENIX *a.* THE COMMISSIONERS OF EMIGRATION.*New York Superior Court ; Special Term, May, 1855.*

## INJUNCTION.—RESTRAINT OF NUISANCE.

Where a deed contained a covenant on the part of the grantor, a municipal corporation, that certain vacant lands in the vicinity of the demised premises called the Battery, should never be appropriated by them or their successors to private uses, held that this covenant did not operate upon lands subsequently added to the battery by the corporation.

Injunction will issue to restrain the State or a municipal corporation from maintaining a nuisance on their lands.

Injunction should not be issued unless the thing sought to be prohibited is in itself a nuisance. If the thing to be enjoined is not in itself noxious, and the risk of the anticipated injury is not imminent, the court may refuse to interfere until the matter has been tried at law.

An immigrant depot is not a known nuisance in the law.

A stronger case must be made out where the ground of the injunction is anticipated depreciation of the value of neighboring property, than where it is injury to the health of the neighborhood.

Order to show cause why injunction should not be made perpetual.

The commissioners of emigration of New York city leased from the corporation the premises known as Castle Garden, to be used as a dépôt or station for the landing of emigrants. The plaintiff on behalf of himself and others, land owners in the neighborhood, obtained a temporary injunction against the defendants. His complaint alleged that the contemplated use of the premises was a violation on the part of the corporation of their covenants in regard to the use of the Battery, contained in the corporation deeds of neighboring lands under which plaintiff claimed title. Further, that if the place were put to the intended use, there was reason to believe that contagious diseases would be generated and spread in the neighborhood. And that the vicinity of a source of noxious and disagreeable odor would depreciate the value of property.

These allegations were supported by affidavits on the part of the plaintiff, and denied and qualified by a large number of affidavits on the part of the commissioners.

*Messrs. Cutting and Perry*, for Plaintiff.

*The Attorney General and Mr. Devlin*, for the Commissioners of Emigration.

*Mr. Anderson*, for Henry R. Concklin.

*Mr. R. J. Dillon*, for the Mayor, &c., of New York.

HOFFMAN, J.—The case is to be considered in two aspects: First, in relation to particular statutes and conveyances, under which the plaintiff insists that he and those similarly situated with him, possess an absolute right, as owners of property, to have the intended use of Castle Garden prohibited. Second, in relation to the general law governing the court in interfering with parties whose acts amount to nuisances, or tend to such consequences, endangering property, health or comfort, as are equivalent to nuisances.

I. As to the particular rights of the plaintiffs as owners of property in the vicinity :—

1. The land upon which Castle Garden stands, as well as the Battery, as it was at any period defined, did not pass to the corporation of New York under the Montgomery charter by the grant of the four hundred feet into the river. The lines of that grant expressly exclude these premises. There was also a reservation of Fort George, “and the ground, full boundaries, and extent thereof, or thereto belonging.”

2. The act of the 16th of March, 1790, in the second section, gave to the corporation all the lands belonging to the people of the State, within the limits described, as well as all the lands within such limits claimed by the corporation, except the lands reserved in the first section. The exception was the ground fronting the Bowling Green, and running to the rear of the lots fronting on Pearl-street, which it is here sufficient to indicate as the government house grounds. The recital shows that the intention was to convey Fort George, and the battery adjacent thereto. The corporation was to hold the premises “for the purpose of erecting public buildings and works of defence thereon, but without any power to dispose of the same for any other use or purpose whatever, and without any power of selling any part thereof.”

In 1791, a map was made by J. Goerck, city surveyor, which shows the line of the Battery as it then existed, and as

it indeed continued until after 1821. It will be noticed that its general course was nearly straight, with the exception of a bastion near the northerly end, which projected irregularly to the westward of the line. It will also be noticed that the whole of Castle Garden, and of the bridge leading to it, are outside, or to the westward of this line. This is shown upon the same map, in connection with the outline of a survey made by Bridges, surveyor in 1807, and traced upon it.

3. The grant by the corporation to the government of the United States, of the 17th of Nov., 1807, comprises two parcels of ground:—First, an oblong, described by metes and bounds of 310 feet, and 300 on its westerly and easterly sides, and 200 feet and 125 feet on its northerly and southerly sides. The map of Goerck, with the additions, exhibits this parcel distinctly.

A careful examination of the map shows that a portion of this oblong was outside, that is, to the westward of the limits of the grant in the statute of 1791. It was beyond the bastion. But another portion of such oblong was within the statutory grant, for it comprised the bastion, as it is shown on the map of Goerck. Although the lines are not run particularly, there can be no doubt that the bastion passed under the statute. The first portion, then, of this transfer to the United States comprised one parcel of land clearly belonging to the corporation, and another parcel, the title to which is not clear. The dimensions of the whole parcel may be roughly stated at 49,000 superficial feet; the parcel the title to which is not traced, at about 30,000.

But the next clause of the conveyance of 1807 grants all the right, title and interest of the corporation "to all that water lot, vacant ground, and soil under water, to be made land, and gained out of the Hudson river, of the breadth of three hundred feet, lying on a course south sixty-four degrees west," adjoining the other parcel of ground. The length into the river is left indefinite.

The habendum of this conveyance is that the premises are to be held for the uses and purposes described. These purposes are expressed in the reservation, viz: "For constructing and erecting of fortifications for the defence of the port and harbor of New York." The condition expressed in the conveyance is, that if at any time hereafter, the premises should

cease to be used for the purposes of fortifications, or for any other purposes in which the public may be immediately interested, then the premises should revert to and re-invested in the mayor, aldermen, &c., and they should and might enter upon the same as of their former estate.

4. The attention of the counsel was called to the statement in the treatise upon the estate of the corporation of New York, that commissioners of the State had ceded the land under water to the United States, and some searches were made to trace this cession, but ineffectually.

It was observed that as the corporation did not appear to have a particle of title to the land under water, secondly described in their conveyance, it was not to be imagined, that the United States would have been content with that mere quit claim of an assumed interest. The following statutes, however, explain the history of the title very satisfactorily:—

By an act of the 20th of March, 1807, the governor, lieutenant-governor, chancellor and others, were appointed commissioners to declare the assent of the legislature to the cession of lands on Staten and Long Island to the jurisdiction of the United States, for purposes of defence. (*Sess. laws*, 1807, *ch.* 51).

By an act of the 18th of March, 1808, the commissioners appointed under the former act had their powers extended to lands in the city and county of New York, and to lands covered with water in said city and county of New York, provided that the cessions to be made of such lands should be necessary for the defence and safety of the city of New York. (*Sess. laws*, 1808, *ch.* 51). By the 4th section of this act, such commissioners were empowered to grant to the United States, for the purpose of providing for the defence of the city, the use of any of the lands and waters belonging to the people of the State, in the said city and county of New York, which lands shall be granted on the express condition of their reverting to the people of this State in case they are not applied to the purposes aforesaid. (See also an act for the extending of Bridge-street to the Battery, passed April 8, 1808, chap. 168).

It appears from the Revised Statutes of 1830, (Vol. 1, p. 68), that a deed of cession was made by these commissioners, dated the 6th of July, 1808, of the parcel of ground at the foot of Hubert-street, and of a portion of the premises now in question.

The deed of cession is stated to be in the Secretary of State's office.

The boundaries of this cession are very particular. The point of beginning is the same as in the re-lease from the corporation. The easterly line is the same; so is the course of the northerly line; but the depth into the river is 500 instead of 200 feet; the length on the westerly side is the same, and on the southerly the depth is 425 feet, instead of 125.

We thus see, that from the same base line at the eastward, the line of the cession by the State ran 500 feet into the river—that of the corporation 200 feet. The latter line ran to a point upon the bridge, about one-third from its commencement.

The cession by the State contained a provision that the United States were to retain the use and jurisdiction so long as the two tracts should be respectively used and applied to the purposes of defence and safety to the city and port of New York, and no longer.

An obscurity exists as to the ground of the claim of the corporation to run 200 feet into the river. The State did not concur in it.

But supposing the claim well founded, we have then the United States holding the property under a cession of the use and jurisdiction, not the fee, from the State, for the westwardly three hundred feet, and under a transfer from the city for the residue, with a clause of reverter upon its disuse.

5. In this situation the act of the 27th of March, 1821, was passed. The corporation was authorized to extend that part of the city usually called the Battery into the river six hundred feet, and all the title of the people of the State, in and to the land, and land under water, in front of and adjoining to the said Battery for that distance, was vested in the mayor and commonalty, "to remain for the purpose of extending such Battery for a public walk, and for erecting public buildings and works of defence thereon; but without any power to dispose of the same for any other use or purpose whatsoever, and without any power of selling it, or any part of it." Under this act, the reversionary right of the State to the land under water on which the castle stands, and to most of that over which the bridge ran, thus passed to the corporation upon the tenure expressed.

6. We thus arrive at the consideration of the act of congress, of March 30, 1822. The President of the United States was authorized to cause the works to be dismantled and disposed of, and to reconvey to the corporation the tract of land granted by them. This operated upon the parcel first described in the conveyance from the corporation, and restored that body to the rights it possessed in 1807. The express condition of the cession by the State would have reinvested the people with their original right and title but for the act of 1821, before noticed. The effect of that act of 1821, was to substitute the corporation for the State.

But the corporation purchased the materials of Castle Clinton from the United States, and possession of the whole of the premises was delivered to it by General Scott, on behalf of the government, about the 16th of June, 1823. (See resolution of that date). The city has continued in possession, used, and leased it, with the occupation of the bridge, from that time to the present, for its own benefit and profit.

7. The operation of the act of May 25, 1812, and that of April 13, 1813, with the sale in 1815, by the corporation, of the government house grounds, and the covenants in their deeds to Jon. Hone and others, is next to be examined. The plaintiff claims under one of these deeds. The covenant is "that the vacant grounds belonging to the parties of the first part, in the vicinity of the premises hereby granted, commonly called the Battery and Bowling Green, shall never be appropriated by the parties of the first part or their successors to private uses." This covenant extended to the Battery as it then existed, and no further. Goerck's map of 1791 defined the limits, pursuing the boundaries of the act of 1790. The covenant did not cover an inch of the ground now in question. The Battery, as then defined, was much to the eastward of that ground. Castle Clinton—all the premises now in question—were in the possession of the United States, and might have been held by them in absolute ownership forever. I am clearly of opinion that the covenant cannot be extended to any land beyond the known limits of the Battery in 1815.

8. The lease to Allen for the premises in question, dated the 23d of March, 1854, comprises a parcel of ground described "as all that certain piece or parcel of land situate in the first



ward of the city of New York, on the North or Hudson river, near the west end of the Battery, and on which the building erected for a fortification, and heretofore known as Castle Clinton, and now as Castle Garden, stands; but without any right of way by carts, carriages or other vehicles upon or across the Battery, or any part thereof, without the special leave of the mayor in writing. The lessee to have no exclusive right to occupy or use the bridge leading from the said Battery to the Garden, except the right of the same for foot passengers, and to have no right of wharfage on either side thereof."

The premises, therefore, are Castle Garden proper, and the right of way over the bridge.

There is a covenant in the usual form, not to assign or sublet the premises without the assent of the corporation.

An assent was given by the comptroller, on behalf of the common council, on the 27th of March, 1855, sanctioning the assignment by Allen to Conklin. The duty and power to give such assent is conferred by the ordinance of 1844, (sec. 4 of title 4). The comptroller has refused his consent to the assignment by Conklin to the commissioners of emigration, made by him on the 5th of May, 1855.

It is insisted that the want of such assent renders that assignment wholly void. It is replied that by consenting to one assignment the covenant is discharged. *Dumpor's case*, (4 *Coke*, 119, *Smith's leading cases*, 15). *Brummel v. Macpherson*, (14 *Vesey*, 173); and *Dakin v. Williams*, (17 *Wend.* 447) have been cited. Whether, as the last case partly intimates, there is not a distinction between conditions and covenants in this particular I need not consider. I am of opinion that it is for the corporation alone to take advantage, by re-entry or otherwise, of any breach of the covenant. No one else can do so. And one among several reasons is, that the reception of rent after the breach would prevent a forfeiture. (*Goodright v. Davids*, *Cowper*, 803). It is stated in the affidavit of the commissioners that they have paid rent since they took possession.

I conclude this branch of the case with the following propositions, which appear to me to be established by the preceding review of the statutes and documents upon the subject.

1. That the plaintiff and other owners of the lots purchased

in 1815 have no right, by virtue of the covenants in the deeds from the corporation, or otherwise, as owners of such lots, to interfere with any use which the corporation may make or permit, of the premises contained in the lease to Allen, and in question in this case.

2. That the corporation of the city of New York are entitled to the building called Castle Garden, and the materials of the bridge, by virtue of their purchase from the United States, in 1823; and are entitled to, and hold, the fee of the soil under such building and bridge, by virtue of the act of 1821.

3. That the United States did not acquire the fee of these premises by the cession from the State in 1808, but only the use of and jurisdiction over the same; that this fee, subject to such right in the United States, passed to the corporation by the act of 1821; that the act of congress and surrender of possession discharged and extinguished this right of the United States, and inured to the benefit of the corporation as grantee of the State; and thus the corporation hold the property under the act of 1821, and according to the conditions, and upon the terms, prescribed by such act.

4. That apart from the question of nuisance, no one but the people of the State has any right to interfere with any use whatever which the corporation may think proper to make of these premises; that persons in the position of this plaintiff may indeed unite in a complaint, or act as relators with the attorney general, to prevent a perversion of the property; but the people, through that officer, must be parties to the action. It is needless to refer to any other case than that of the Broadway Railroad, (11 *Legal Obs.*, 359), to support this proposition. The condition attached to the grant by the State, and the purposes for which the land was bestowed, were all of a public nature—concerning all the inhabitants of the city at large.

5. That the want of the assent of the comptroller to the assignment by Conklin, if legally necessary, and not dispensed with by reception of rent, is an objection only to be taken advantage of by the corporation itself.

II. I proceed to the consideration of the second branch of the cause.

1st. There can be no question that if the occupation of Cas-

the Garden as an emigrant dépôt would amount to a nuisance, neither the corporation of New York, nor the State, nor the two united, could so employ it. An injunction would then be granted. In addition to the cases cited, I refer to the Attorney General *v.* Johnstone, (2 *Wilson's Rep.*, 95, 2 *Starkie*, 51), and to the Attorney General *v.* Parmentier, (vol. 6, *Exchq. Rep.*, *Phil. edition*): "The crown has not a right either itself to use the title to the soil between high and low water as a nuisance, or to place upon that soil what will be a nuisance to the crown's subjects. If the crown has not such a right it could not transfer it to the city of London." An injunction was retained to await the result of an indictment which was pending.

2d. But few points are better settled than this:—That a Court of Chancery will not interfere by injunction unless the thing sought to be prohibited is in itself a nuisance, and irreparable mischief will ensue unless the prohibition is granted before a trial at law. If the thing to be enjoined is not noxious of itself, but something which may, according to circumstances, prove to be so, the court will refuse to interfere until the matter has been tried at law. But if the magnitude of the injury to be dreaded is great, and the risk so imminent that no prudent man could think of incurring it, the court will not refuse to interfere on the ground that there is a possibility that the anticipated injury from the noxious erection may not happen.

These are the general rules laid down by Lord Brougham, (*Cooper's R. Temp. Brougham*, 343), adopted by Chancellor Walworth, (6 *Paige*, 563), and sustained and applied in the following cases:—*Rowe v. The Granite Bridge Company*, (21 *Pick.* 344), *Vaughan v. Law*, (1 *Humphrey*, 123), *Kirkman v. Houck*, (11 *Humphrey*, 406), *City of Georgetown v. Alexandria Canal Company*, (12 *Peters*, 92), *White v. Cohen*, (19 *Eng. L. and Eq. Rep.*, 149). See also the subject examined in *The Attorney General v. The Sheffield Gas Company*, (3 *De Gex, McNaughtan and Gordon*, 316).

While the general rule is thus stated, it will be noticed, that in very many of the authorities the effect of the intended erection was an expected injury to property merely.

The cases which relate to an expected injury to health and

comfort require to be more particularly referred to, as more applicable to the present question.

The principal of such cases are the following :—Anon, (3 *Atk.*, 750), *Catlin v. Valentine*, (9 *Paige*, 576), *The Burnt Island Whale Fishing Company v. Trotter*, (5 *Wilson & Shaw*, 649), *Swinton v. Pedrie*, (15 *Shaw & Dunlap*, 775, *McLean & Robinson's Parl. Rep.*, 1018), *The Mayor of London v. Bolt*, (5 *Vesey*, 129), *The Attorney General v. Cleaver*, (18 *Vesey*, 211), *Attorney General and others v. Blount*, (4 *Hawks*, 384).

We find most of these cases to be those of slaughtering-houses. Now such an erection is indictable as a nuisance at common law, (*Rex v. Cross*, 2 *Carr & Payne*, 483, and see *Rex v. Watts*, *Ibid* 486). The Scottish cases, *Catlin v. Valentine*, and several others in our courts, are open to the comment that *prima facie* the trade or building to be inhibited was indictable as a nuisance, and the court would not permit an experiment to be made to ascertain whether untried, though apparently efficient means, might not remove or diminish the evil.

The Scottish case of *Swinton v. Pedie* deserves particular notice. The bill of suspension and interdict was to restrain the erection of a range of shambles and slaughter houses, which, it was alleged, would prove a nuisance to the property of the parties, and would pollute a mill head which passed the neighborhood. The interdict granted by the lord ordinary, to whom it was presented, was absolute; restraining the erection of the buildings as well as the intended use of them as shambles. This was *ex parte*. On a hearing he recalled the interdict so far as it prohibited the erection of the buildings, but no further.

When the record was closed, (proofs being taken), another lord ordinary made the interdict permanent as it was modified.

On appeal from this decision, the plans by which the party expected to remedy the evil were ordered to be submitted. This was done at length, and, upon considering them, the Scottish Appeal Court adhered to the interdict.

Then in the house of lords it was recognized that the effect of the interdicts, as they stood, allowed the party to go on with the building. The result was, that the interdict was sustained, but with a qualification or declaration which would

enable the party to apply to the court thereafter for an opportunity to try the experiment whether the means he had devised were effectual to remove the nuisance. The court was not by the decree to be prevented from recalling the interdict if so advised.

The foundation of the decision throughout was, that a slaughter house in a city was, by the law of Scotland as of England, a common nuisance.

In *Rex. v. Ward*, (1 *Burrows*, 333), the indictment was for erecting and continuing works for making acid spirit of sulphur, oil of vitriol, and oil of aquafortis; that in the process was sent forth abundance of noisome, offensive and stinking smoke, whereby the air was impregnated with noisome and offensive smells, to the common nuisance of all the king's subjects residing, &c. From the judge's report it appeared that the smell was not only intolerable and offensive, but also noxious and hurtful, and made many persons sick. A conviction was sustained. The word noisome was held synonymous with noxious, and that included insalubrity and unwholesomeness.

I think, then, that the rule declared by Lord Hardwicke in the case cited from 3 *Atkyns* is to this day the general rule of the court upon this subject. Bills to restrain alleged nuisances must be for such as are known nuisances in the law. Unless they are such, the court will not interfere without a verdict, except in very marked and imperative cases of imminent and irretrievable danger. Otherwise the parties will be left to indictment, or abatement; or occasionally an issue will be directed.

It is impossible to say that the law has pronounced an emigrant depôt in a city to be a public nuisance. Its character must be established by the nature of the diseases of its inmates—their frequency and extent—the number of persons received—the peril to health flowing from their presence—the location of the edifice as to a large or scanty population in its vicinity—the precautions which may be used, and may be depended upon; and many other circumstances peculiar to each individual case.

3d. It becomes therefore necessary for me to examine the particular circumstances appearing upon the affidavits and documents presented.

The State has considered the regulation of emigration into its limits as of such importance as to call for the appointment of a particular board to superintend it. The act of May, 1847, (chap. 195), created the commissioners of emigration such a board, and provided a fund by appropriating the tax of \$1 50 for every emigrant for whom a bond was not given, to meet the expenses incurred for the support of the poor among them. In 1848 their authority was enlarged by the legislature in the act of April 11 of that year, and again by the act of April 13, 1850.

It is plain that the prominent object of the legislature in such an organization was to relieve the cities from the burthen of supporting the multitudes of the indigent and sick among the emigrants; to afford them means of support or restoration to health, until the opportunity of sustaining themselves was offered; of sheltering the unwary from the infamous frauds which were constantly practised upon them; and of guarding against the propagation of dangerous diseases with which they might be afflicted when they reached these shores.

Among other provisions for the accomplishing these, or some of these objects, the commissioners were authorized by the first section of the act of 1848 to lease or purchase suitable docks or piers in the city of New York, and to erect necessary enclosures thereon for the exclusive use of landing emigrant alien passengers; but no docks or piers could be purchased or leased without the approval or consent of the common council. A license was to be given on certain conditions, to proprietors of lighters or steamboats, to receive passengers from the vessels and land them on the selected piers, and a penalty was imposed for landing them upon any other piers or wharfs.

The act of April 13, 1855, directed the commissioners to designate some one place in the city for the landing of the passengers; and the seventh section provided that they shall have authority to purchase, lease, and occupy such wharves, piers, and other accommodations in the city of New York as may be necessary for the accommodation of emigrant passengers for the purposes of landing them. The eighth section places the authority in the health officer, to give notice to masters and owners to land the passengers at the pier or places thus designated.

The principal difference between the powers thus conferred, and those granted in the act of 1848, is that the consent of the corporation is not now made necessary to a purchase.

These provisions clearly indicate the sense of the legislature and of the commissioners of emigration, on whose application they were obtained, that the selection of particular places for the purpose of landing emigrants was of importance to carry out the objects in view.

I have carefully examined the affidavits now before me, and I consider that they establish, beyond any reasonable doubts, these points:—

1. That the selection of Castle Garden enables the commissioners more effectually to guard the emigrants from frauds and imposition. That it is of great advantage in facilitating their dispersion throughout the country; and of giving them the benefit of the counsel and aid of the several societies specially formed to watch over their comfort.

2. That the employment of Castle Garden for the purpose of a re-examination is of manifest advantage, in its tendency to secure the health and comfort of the emigrants themselves. The judgment and experience of the commissioners, confirmed by the affidavit of Dr. Harris, formerly deputy health officer, Dr. Osborn, and other physicians, of Captain Crabtree, and of Cyrus Curtis, formerly a commissioner of emigration, establish this.

3. The bringing together all the emigrants whose diseases have escaped detection at Quarantine, into one place, such as the premises in question, is decidedly more likely to avert the propagation of diseases in the city at large than the present system. The effects of landing the passengers at different points—of immediately crowding them into filthy boarding houses—are stated in the affidavits of several of the experienced physicians and others, and bear every appearance of good sense and truth.

4. The question of the deterioration of the value of property depends chiefly on the settlement of the question next discussed, as to the effect of the proposed use of the Garden upon the health of the neighboring inhabitants. As far as any distinction exists, it is sufficient to say, that a stronger case must be made for an injunction than in cases of threatened injuries

to health. When a nuisance is established and abated by the verdict of a jury, the injury to property will be removed.

5. In relation to the decision in *Brower v. The Mayor, &c.*, (3 *Barb. S. C. Rep.*, 254), I may say that a case was there made by the plaintiff, and not successfully repelled by the defendants, widely different from the present.

6. The remaining and leading question is as to the extent and imminence of the danger from contagious or infectious diseases, to the inhabitants in the immediate vicinity, represented by the plaintiff.

The distance of the Garden from the nearest habitation is about five hundred feet. The intermediate space is open ground, with a free ventilation. I must confide in the statements of the commissioners, that they mean to prevent the emigrants from intruding on the Battery grounds, and I see no difficulty in their accomplishing this purpose.

Disregarding the long list of deponents on each side, whose want of information upon this subject robs their opinion of weight, I have given my principal attention to the affidavits of the medical gentlemen. If the rustic rule of decision, *numero non pondere*, was applied, I find an overwhelming number on the part of the defendants. It is of course beyond my power to estimate the relative weight of character and qualification. But several of the physicians on the part of the defendants are now, or have been, in official situations which entitle their opinions to influence, independent of comparative professional eminence. Among these are Dr. Harris, formerly deputy health officer, whose affidavit merits particular notice; Dr. Sterling, physician at the Marine Hospital from 1848 to 1853, and examining physician of the commissioners since that time; Dr. Rockwell, health officer for four years, and now resident physician of city and agent of the board of health; Dr. Miller, the present health commissioner, and formerly member of the common council and on the committee of public health; Dr. Fay, deputy health officer for three years prior to the summer of 1854; Dr. Cox, visiting physician to the hospital of the commissioners; Dr. Thompson, health officer of the port of New York; Dr. Roth, in the employ of the commissioners at Quarantine; Dr. Martindale,



deputy health officer of the port ; and Dr. Vaché, physician in chief of the Marine Hospital, and for five years resident physician of the city.

The opinions of so large a number of responsible officers and experienced physicians are in my judgment decisive. I attribute more than mere personal importance to the oaths of those who have been set apart by the public to watch over the health of the city ; whose experience and constant familiarity with the habits and diseases of emigrants mark them as best qualified to speak with authority ; and whose prejudiced or even hasty judgment involves, not merely the impeachment of their fairness and intelligence, but the violation of a solemn duty consigned to them by the public. All these, with entire unanimity, state that the apprehensions of the spread of contagion from such a use of Castle Garden as is proposed, are groundless.

7. Another consideration is, that the common council of the city, as conservators of the public health, may abate every nuisance ; and, if experience proves that the evils and dangers anticipated by the plaintiffs are in any degree realized, they may be immediately removed. The powers of our corporation are as extensive as those of the municipal authorities of Boston or of Albany ; and such is the rule prevailing there. (*Baker v. Boston*, 12 *Pick.*, 184 ; *Van Wormer v. The Mayor of Albany*, 15 *Wendell*, 262). By the act of 1850, (*ch.* 275), the mayor and common council are constituted the board of health ; and by section 2 of article 1, title 3, they have full authority to abate all nuisances within the city.

I have given to this motion the care and study its importance and interest demand, and the result is a conviction that to arrest the plan of the commissioners, full as it is of so many undeniable benefits, upon the evidence now before me, would be a rash and unwarrantable exercise of power, salutary only when wielded with caution, but a formidable and mischievous engine of wrong when exerted except upon the mandate of imperious necessity.

The motion for the injunction must be denied, and the temporary order discharged, without costs to either party.

NOTE. This decision was affirmed on appeal to the general term.

DIGEST  
OF  
ALL POINTS OF PRACTICE  
EMBRACED IN  
THE STANDARD NEW YORK REPORTS,  
*Issued during the period covered by this Volume,*  
WITH REFERENCES TO  
THE AMENDATORY ACTS OF 1855.

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ABATEMENT.

ANSWER, 19, 20; JUSTICES' COURT, *tit. Pleadings*, 7.

ABSENT AND ABSCONDING DEBTORS.

ATTACHMENT, 7, 8, 9.

ACCESSORY.

The rule of the common law that an accessory cannot be tried until after the conviction of his principal, has not been abrogated. *Baron a. The People*, 1 *Parker's Cr. R.*, 246.

ACCORD AND SATISFACTION.

EVIDENCE, *tit. Burden of Proof*, 1; TRIAL, *tit. New Trial*, 10.

ACCOUNTS.

EVIDENCE, *tit. Private Writings*, 1, 2; JUSTICES' COURT, *tit. Jurisdiction*, 9; SURROGATE'S COURT, 1.

ACCOUNT STATED.

EVIDENCE, *tit. Admissions*, 4; TRIAL, *tit. Charge*, 4.

ACQUITTAL.

When a former trial and acquittal will be a bar to a second indictment for the same acts, charged as constituting a different offence. *Burns a. The People*, 1 *Parker's Cr. R.*, 182. See also *The People a. Warren*, *ib.*, 338; *The People a. Allen*, *ib.*, 445.

## Reports and Statutes.

## ADMINISTRATOR.

## EXECUTORS AND ADMINISTRATORS.

## AFFIDAVIT.

The *venue* is an essential part of an affidavit; and is *prima facie* evidence of the place where the affidavit was taken; and an affidavit without a *venue* is a nullity, although sworn to before an officer whose residence is mentioned in the jurat. *Cook v. Staats*, 18 *Barb.*, 407.

ATTACHMENT, 3, 5; INJUNCTION, 4; JUSTICES' COURT, *tit. Default*, 2, 5; MOTIONS AND ORDERS, 8, 9; SERVICE AND PROOF OF, 9, 10; VERIFICATION.

## AFFIRMATIVE RELIEF.

The affirmative relief which the court is authorized by section 274 of the Code, to grant to a defendant, is affirmative relief against the plaintiff only; not against a co-defendant. *Mechanics' and Traders' Savings Institution v. Roberts*, *Ante*, 381; and see *Tracy v. The N. Y. Steam Faucet Company*, 1 *E. D. Smith's C. P. R.*, 349.

## AGENT.

ANSWER, 10, 11; JUSTICES' COURT, *tit. Default*, 2, 4; PARTIES, 4; PLEADING, 27; VERIFICATION, 3.

## ALIEN.

## JURISDICTION, 3.

## AMENDMENT.

1. On amending a complaint, when it is done under section 172 of the Code, as a matter of course and of right, a plaintiff may add a new cause of action. *Mason v. Whitely*, *Ante*, 85.
  2. The only restrictions imposed upon the right of plaintiff to amend are, that he shall not amend for the purposes of delay, nor to prevent a trial at a term for which the action is or may be noticed to be tried; and that the cause of action added be one that may properly be united with the one contained in the original complaint. *Ib.*
  3. When the defendants serve a written offer to let judgment be entered against them under section 385 of the Code, and the plaintiff, without accepting such offer, and after the time for accepting it has elapsed, serves an amended complaint not materially affecting the issue, and issue is joined thereon, the defendants are not by such an amendment deprived of the benefit of the offer.
- It seems* that such an offer may be made even before the complaint is

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- served, and that no amendment of the complaint would deprive the defendants of the benefit of the offer. *Kilts v. Seeber*, 10 *How. Pr. R.*, 270.
4. Plaintiff purposely commenced his action upon contract with a view to obtain an order for publication and warrant of attachment; and having obtained this, applied for leave to amend the summons and complaint so as to found the action, not upon contract, but upon tort:—*Held*, that the application was properly denied at the special term. *Lane v. Beam*, *Ante*, 65.
  5. *It seems* that the court has not power to permit an amendment to the answer to be made upon the trial, which sets up a new and distinct defence. *Fagen v. Davison*, 2 *Duer*, 153; *Hunt v. Hudson River Fire Insurance Company*, *Ib.*, 481.
  6. An application upon the trial for permission to amend a pleading is addressed solely to the discretion of the judge, and his decision is not properly appealable. *Hunt v. Hudson River Fire Insurance Company*, 2 *Duer*, 481.
  7. Upon the trial plaintiff was permitted to amend his complaint by adding an averment that the deed (which he had pleaded as an absolute conveyance) was made as collateral security, and was a mortgage, it being stipulated that this averment should be deemed traversed by the answer.
- Held*, on appeal, that this amendment was within the discretion of the judge, and not subject to review in the Court of Appeals. *Hodges v. The Tennessee Marine & Fire Insurance Co.*, 4 *Seld.*, 146.
8. In a bill filed before the vice chancellor in the second circuit to foreclose a mortgage of lands in the first circuit, the fact which gave the vice chancellor jurisdiction, viz., the residence of certain parties within his circuit, was not alleged; but after the bill had been taken as confessed against a defendant, the plaintiff was permitted to amend by averring the facts necessary to give jurisdiction.
- Held*, that the amendment cured the defect, and that title under the foreclosure was good against the defendant in respect to whom the bill was taken as confessed before amendment. *Classon v. Cooley*, 4 *Seld.*, 426.
9. An application after judgment for the defendant, for leave to amend the complaint, was refused as being too late, where the defendant's principal witness was dead, and the proposed amendment changed the whole gravamen of the action. *Egert v. Wicker*, 10 *How. Pr. R.*, 193.
  10. Amendments to the pleadings, affecting the merits, not to be made

## Reports and Statutes.

by the general term, on appeal after judgment. *Brown v. Colie*, 1 *E. D. Smith's C. P. R.*, 265.

11. The complaint against the assignee, in a fraudulent transfer of property by a deceased person, joining with the assignee, the administrator of his assignor as defendant, and seeking to have the transfer set aside, omitted to show that the administrator claimed to regard the transfer as *bona fide*; but the administrator's answer averred that fact. Upon appeal from judgment against defendants—*Held*, that the omission in the complaint might be then cured by amendment. *Bate v. Graham*, 1 *Kern.*, 237.

APPEAL, 5; COMPLAINT, 18; COSTS, 5; CRIMINAL LAW, *tit. Judgment*, 4, 5; DEPOSITION ON COMMISSION, 7; DEPOSITION DE BENE ESSE, 3; EXECUTION, 1, 7; JUSTICES' COURT, *tit. Pleading*, 3, 4, 6.

## ANSWER.

1. A *sham* answer, defined to be one good upon its face, but setting up new matter which is false;—the remedy is by motion to strike it out. *Lefferts v. Snediker*, *Ante*, 41.
2. An answer is *sham* only when it sets up new matter known to the defendant to be false. *Benedict v. Tanner*, 10 *How. Pr. R.*, 455.
3. What circumstances in the nature of the allegations made by the pleadings, will prevent an answer being struck out as *sham*. *Ib.*
4. Slight circumstances indicating good faith, are sufficient to prevent a verified answer from being stricken out as *sham*. *Munn v. Barnum*, *Ante.*, 281.
5. Where neither complaint nor answer are verified, and the answer merely denies the allegations in the complaint, setting up no new matter, it cannot be stricken out as *sham*. *Goedel v. Robinson*, *Ante*, 116.
6. A denial in an answer, of knowledge or information sufficient to form a belief, as to matters stated in a complaint, is not necessarily *sham* or evasive, unless it appears that the party had the means of obtaining information directly within his reach. *Wesson v. Judd*, *Ante*, 254. And see *Ketcham v. Zerega*, 1 *E. D. Smith's C. P. R.*, 553.
7. A *frivolous* answer defined to be one which controverts no material allegation in the complaint, and presents no tenable defence;—the remedy is by application for judgment, upon five days' notice. *Lefferts v. Snediker*, *Ante* 41.
8. An answer, putting in issue all the material allegations of a complaint which are employed to show that the title to a note sued upon

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is in the plaintiff, and that he is the actual party in interest, is not frivolous. *Metropolitan Bank v. Lord, Ante, 185.*

9. When a complaint upon a promissory note, in an action against the *maker* and *payee*, to show title in the plaintiff, avers an indorsement by the payee, and a delivery to the plaintiff, but not saying by whom, and that the plaintiff is "the holder and owner of such note," an answer which puts in issue the latter allegation, and denies that the payee ever delivered it to the plaintiff, but on the contrary alleges that he delivered it to a third person, whose name is stated, is not frivolous. *Ib.*

10. *Complaint* against a corporation, on a promissory note made by its agent.

*Answer* : Defendant has no knowledge or information sufficient to form a belief that it did at the time, and for the purpose stated in the complaint, by its authorized agent, make its promissory note by the name and for the amount, and as is in this respect set forth in said complaint.

*Held*, at chambers, that the answer was frivolous, and should be stricken out as such, on the ground that a corporation is bound to know whether it has executed a promissory note such as was alleged. *Thorn v. The New York Central Mills, 10 How. Pr. R., 19.*

11. *Held*, by the general term :—

1. That it is bad pleading on the part of a corporation, or of a principal, to deny knowledge of such acts of an agent as these.
2. That this question being new, the answer should not have been stricken out as frivolous, for this defect.
3. That the answer should, however, be stricken out as frivolous, for violating the established rules of pleading, by denying the allegations of the complaint conjunctively. *Shearman v. The New York Central Mills, Ante, 187.*

12. A denial in an answer of knowledge sufficient to form a belief is not good, as a denial of knowledge or information sufficient, &c. *Ketcham v. Zerega, 1 E. D. Smith's C. P. R., 553.*

13. In an action on a judgment brought in the court in which the judgment was rendered, the defendant ought not to be permitted to deny that he has knowledge or information sufficient to form a belief whether the plaintiff did recover the alleged judgment. *Ib.*

14. A defendant who admits that he executed an instrument upon which he is sued, cannot deny information sufficient to form a belief as to facts stated in the instrument. *Wesson v. Judd, Ante, 254.*

15. A defendant who admits having executed an instrument similar to

that upon which he is sued, cannot deny, merely upon a want of information sufficient to form a belief, that the instrument is correctly set forth in the complaint; but he is entitled to an inspection of the original to enable him to answer. *Ib.*

16. An answer which, without denying any fact stated in the complaint, merely says that, "the defendant denies that the plaintiff is entitled to the money demanded," will be struck out on motion. *Drake v. Cockroft, Ante, 203.* And compare *Higgins v. Rockwell, 2 Duer, 650.*
17. An answer which merely alleges a conclusion of law without setting out the facts by which that conclusion is supported, is insufficient to admit evidence of those facts. *Seeley v. Engell, 17 Barb., 530.*
18. The facts which are relied upon as constituting a defence must be set forth in the answer, with at least so much certainty as to enable the court to say that, admitting them to be true as alleged, they constitute a bar to the plaintiff's recovery. And where the defendant relies upon an award of arbitrators upon the matter in controversy, as his defence, although it may not be necessary to set forth its terms, its substance must be set forth so fully as to enable the court to say that if such an award was made the action is barred. *Gihon v. Levy, 2 Duer, 176.*
19. The Code has in effect abrogated the old rule, that a plea in bar waived all pleas in abatement. Under the Code, whenever issue is joined upon an answer containing matter in abatement and in bar, the jury may be required to find specially upon each issue. If the issue upon the matter in bar is found for the plaintiff, and the issue upon the matter in abatement for the defendant, the court can give a judgment dismissing the plaintiff's complaint, leaving him to commence a new action. *Sweet v. Tuttle, 10 How. Pr. R., 40.*
20. The rule that an objection in the nature of a plea in abatement cannot be taken in a general answer, is abolished by the Code. And where the defendant answered, denying each and every allegation in the complaint, and alleging the non-joinder of his co-partner—*Held good.* *Mayhew v. Robinson, 10 How. Pr. R., 162.*
21. The rule of the old system of pleading, that a special plea admits the matters stated in the declaration, is applicable to pleadings under the Code. *Gregory v. Trainer, Ante, 209.*
22. Under section 150 of the Code, the defendant may plead a partial defence; *e. g.*, mitigating circumstances in an action of libel or slander. *Bush v. Prosser, 1 Kern., 347.* But see *Kneedler v. Sternbergh, 10 How. Pr. R., 67.*
23. The objection that the plaintiff in a suit is not the real party in in-

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- terest must be set up in the answer, to enable defendant to rely upon it as a defence; and although the fact should appear upon the trial from the examination of witnesses, it is then too late for the defendant to avail himself of it. *Jackson v. Whedon*, 1 *E. D. Smith's C. P. R.*, 141.
24. An answer which merely denies the allegations in the complaint does not allow the defendant to rely upon an award of arbitrators upon the matters in controversy as a bar to the action, although the award appears from the plaintiff's evidence. The award should have been set up as a defence in the answer. *Brazill v. Isham*, 1 *E. D. Smith's C. P. R.*, 437.
25. In an action to recover the possession of personal property, the defendant may set up a general denial and justification, in his answer, where they are separately pleaded. Neither under the statute of Anne (4 & 5 *Anne*, ch. 16, §§ 4 & 5) nor under our former statute, (2 *Rev. Stats.*, 352, § 23) would these defences have been held inconsistent; nor are they so under the Code. *Hackley v. Ogmun*, 10 *How. Pr. R.*, 44.
26. Where the complaint contained two counts, each upon a promissory note, an answer referring simply to "the note mentioned in the complaint"—*Held* bad for uncertainty. *Kneedler v. Sternbergh*, 10 *How. Pr. R.*, 67.
27. Although it was the general practice to plead the discharge according to the bankrupt act of 1841, yet under the old practice a plea of the general issue and notice of the discharge was held sufficient to admit the certificate in evidence. *Campbell v. Perkins*, 4 *Seld.*, 430.
28. Whether under the Revised Statutes prior to the Code the defendant could give notice of special matter with a plea of *nul tiel record*—*Query*? *Ward v. Barber*, 1 *E. D. Smith's C. P. R.*, 423.
29. *Held*, in the Supreme Court, that in an action for slander, matter in mitigation can be pleaded only when the defendant alleges the truth of the words complained of. *Ayres v. Covill*, 18 *Barb.*, 260; *Herr v. Bamberg*, 10 *How. Pr. R.*, 128; *Contra*, *Heaton v. Wright*, 10 *How. Pr. R.*, 79.
30. And where in one defence the defendant pleaded certain matters in justification, in a second defence other matters in justification, and in a third defence stated in mitigation of damages, the same matters as those contained in the first defence, the court having stricken out the first defence on the ground that it constituted no justification, ordered the third to be stricken out also. *Herr v. Bamberg*, 10 *How. Pr. R.*, 128.



31. *Held*, in the Court of Appeals, that in such an action, matter in mitigation may be pleaded either with or without a plea of justification. And a plea of justification does not conclude the defendant from the benefit of evidence tending to disprove malice. *Bush v. Prosser*, 1 *Kern.*, 347.
32. Section 165 of the Code changes both the rules of pleading and the rules of evidence in actions for libel and slander. In such actions the defendant may give in evidence any or all facts and circumstances which have a legitimate tendency to disprove malice, or show that the truth of the charge was probable or properly inferable, and even the truth of the charge itself. *Heaton v. Wright*, 10 *How. Pr. R.*, 79.
33. In an action for slander, the defendant may deny the uttering of the words, and also set up by way of justification that the words alleged to have been spoken by him were true. *Buhler v. Wentworth*, 17 *Barb.*, 649.
34. A partial defence cannot be pleaded under the Code any more than formerly. Whether notice may be given with a plea,—*Query?* *Kneedler v. Sternbergh*, 10 *How. Pr. R.*, 67. But compare *Bush v. Prosser*, 1 *Kern.*, 347.

AMENDMENT, 5; DEMURRER, 2, 3, 5; EVIDENCE, *tit. Judgments and Judicial proceedings*, 6, 7; JUDGMENT, 3; PLEADING.

#### APPEAL.

1. The court cannot extend the period for appeal from special to general term, or allow an appeal when the time has expired. Nor should this be done by affixing a new date to the judgment. *Humphrey v. Chamberlain*, 1 *Kern.*, 274.
2. A decision upon a demurrer to the whole complaint, sustaining or overruling the demurrer, and directing that the successful party have judgment, is a judgment when entered. An appeal does not lie from such a decision as from an order under section 849 of the Code. *Bauman v. The New York & Central Railroad Company*, 10 *How. Pr. R.*, 218; *Contra per HARRIS, J. Norton v. The Western Railroad Corporation. Ib.*, 97.
3. But it is otherwise where the demurrer is to a part of the complaint, and leave to amend or answer is given. In such case, the appeal may be as from an order. *Cook v. Pomeroy*, 10 *How. Pr. R.*, 221; *Norton v. Western Railroad Corporation, Ib.*, 97.
4. Where the Recorder's Court of Buffalo ordered judgment for the plaintiff on a demurrer to an answer, with leave to the defendant to amend on payment of costs, and by stipulation between the parties

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- judgment was entered by the plaintiff for the amount of the costs, to enable the defendant to appeal;—*Held*, not a final judgment, and the appeal was dismissed. *Perkins v. Farnham*, 10 *How. Pr. R.*, 120.
5. An order at special term allowing an action to be continued in the names of surviving plaintiffs and the heir of the deceased plaintiff, and allowing the addition of new counts to the declaration, and the filing of a supplemental complaint is appealable. It affects a substantial right. *St. John v. Croel*, 10 *How. Pr. R.*, 253.
  6. The Court of Appeals can review only those parts of a decree from which an appeal is taken. *Robertson v. Bullions*, 1 *Kern.*, 243.
  7. The Court of Appeals have jurisdiction to review an order made by the Supreme Court vacating a judgment entered by confession. *Belknap v. Waters*, 1 *Kern.*, 477.
  8. An action in the nature of a writ of *quo warranto* is a civil action; and the decisions of the Supreme Court in the course of such an action will be reviewed in the Court of Appeals, upon the principles applicable to civil actions, and not by those which prevail in criminal proceedings. *The People v. Cook*, 4 *Seld.*, 67.
  9. In proceedings to determine the title to land, under Revised Statutes, tit. 2, pt. 3, ch. 5, either party may appeal. *Laws of 1855*, 943, ch. 511.
  10. On appeal from judgment on the report of a referee, the Court of Appeals cannot review questions which were not raised before the referee, although they may have been raised before the general term of the court below on the argument of a motion to set aside the report. *Morris v. Husson*, 4 *Seld.*, 204.
  11. The finding of a referee on a question of fact cannot be reviewed in the Court of Appeals, but the only redress of the party is the power of the court below to set aside the report as against the weight of evidence. *Lockwood v. Thorne*, 1 *Kern.*, 170.
  12. The Court of Appeals will not review interlocutory orders, except such as end the suit and prevent the rendering of a judgment from which an appeal would lie, or unless there is an appeal from the judgment. An order changing the date of a judgment, the time for appeal from which judgment had elapsed, in order that a party might appeal, although improper, is not an order from which an appeal will lie to the Court of Appeals. *Humphrey v. Chamberlain*, 1 *Kern.*, 274.
  13. *It seems*,—that the general term should not on appeal from an order directing the payment of money admitted to be due to the plaintiff, review the discretion exercised at special term, in respect to condi-

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- tions on which the order should be granted. *Merritt v. Thompson*, *Ante*, 223.
14. Judgment will not be reversed on appeal because material facts were proved, not being objected to, which had been omitted in the allegations of the complaint. *Davis v. Cayuga & Susquehanna R. R. Co.*, 10 *How. Pr. R.*, 330.
  15. One of the defendants in a judgment against two may appeal, and the appellate court may reverse the judgment as to him, and suffer it to stand against the other who took no appeal, in cases where a separate judgment would have been proper. *Geraud v. Stagg*, 10 *How. Pr. R.*, 369.
  16. An appellate court, upon reviewing a judgment upon a case made at the trial, can only reverse the judgment and order a new trial; it is not authorized to render final judgment for the appellant. *Astor v. L'Amoreaux*, 4 *Seld.*, 107.
  17. It seems that where a decision of the general term affirming a decision at special term, sustaining a demurrer is final, no leave to plead over being given, appeal should be taken directly from that decision as a judgment. If, however, it be necessary as a matter of form to wait until judgment is perfected in the action, and then to appeal from that judgment to the general term, before going to the Court of Appeals, the court will not as a general rule, permit appellant to argue on the second appeal the same questions which were discussed upon the first. *Keteltas, v. Myers*, *Ante*, 403.
  18. Where judgment of non-suit was reversed by the Court of Appeals, and a new trial ordered,—*Held*, on appeal from the judgment rendered on the second trial, that as the right of the plaintiffs to recover on the facts stated in their declaration was directly involved in the decision of the first appeal, it must be deemed to have been then conclusively established. *Buell v. Lockport*, 4 *Seld.*, 55.
- AMENDMENT, 7, 10, 11; COSTS, 16, 17, 19, 21, 22; CONTEMPT, 7; CRIMINAL LAW, *tit. Writ of Error*, and *tit. New Trial*; EXCEPTIONS; JUDGMENT, 1, 2, 6; JUSTICES' COURT, *tit. Appeal*; MOTIONS AND ORDERS, 1, 7, 10; SPECIAL PROCEEDINGS, 1, 2, 3; STATUTORY CONSTRUCTION, 4; STAY OF PROCEEDINGS, 1, 4, 5; SUPPLEMENTARY PROCEEDINGS, 1, 7; TRIAL, *tit. New Trial*.

## APPEARANCE.

One of several defendants who has appeared in the action, although without pleading, is entitled to notice of trial of the issues between the plaintiff and the other defendants. *Tracy v. The N. Y. Steam Faucet Company*, 1 *E. D. Smith's C. P. R.*, 349.

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JURISDICTION, 9 ; JUSTICES' COURT, *tit. Jurisdiction*, 4, *tit. Default*, 2 ; MOTIONS AND ORDERS, 12.

## ARBITRATORS.

ANSWER, 18, 24.

## ARREST.

1. A sheriff is not privileged from arrest. He may be arrested in an action for damages for taking personal property under an execution. *Hill v. Lott*, 10 *How. Pr. R.*, 46.
2. The defendant in an action for the recovery of the possession of real estate and the rents thereof, cannot be imprisoned. *Fullerton v. Fitzgerald*, 18 *Barb.*, 441.
3. A defendant cannot be twice arrested by process out of different courts in the same State, for the same cause of action.  
Where a second arrest had been made, and he moved for a discharge, *Query?* whether the plaintiff was not entitled to an election as to which court he would proceed in.  
In such case, it is the better practice to reduce the bail to a nominal amount. *Hernandez v. Carnobelli*, 10 *How. Pr. R.*, 438.
4. The recovery of a judgment upon a debt fraudulently contracted does not prevent the arrest of the defendant, either in an action on the judgment or in a subsequent action for damages for the fraud. *Wanzer v. De Baun*, 1 *E. D. Smith's C. P. R.*, 261.
5. The original cause of action is merged in the judgment obtained thereon, and in an action upon a judgment the defendant is not liable to arrest upon the ground that the judgment was obtained for moneys received by him in a fiduciary capacity. *Goodrich v. Dunbar*, 17 *Barb.*, 644. But compare *Mahaney v. Penman*, *Ante*, 34.
6. Upon motion to discharge an arrest, the court will permit a partial trial of the cause.  
The order should be vacated, if the plaintiff fails to make out his cause of action and arrest. *Hernandez v. Carnobelli*, 10 *How. Pr. R.*, 438.
7. A judge has no jurisdiction to issue a warrant under the non-imprisonment act of 1831, for the arrest of a debtor, on the ground that he has assigned, removed, or disposed of, or is about to dispose of his property, with intent to defraud his creditors, unless the charge is established by satisfactory evidence in the form of an affidavit, produced before the judge. A warrant issued without an affidavit containing evidence which, in the judgment of the officer amounts to proof of the charge, is void, and affords no protection to the parties

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suing it out, when sued for false imprisonment, in directing an arrest under it. (3 *Barb.*, 189; 6 *Hill*, 429; 14 *Wend.*, 237; 7 *Hill*, 187; 2 *Comst.*, 103; 5 *Barb.*, 575; *ib.* 607.) *Vredenburg v. Hendricks*, 17 *Barb.*, 179. And see *Taylor v. Harker*, 1 *E. D. Smith's C. P. R.*, 391.

COMPLAINT, 5; EVIDENCE, *tit.*, *Judgments and Judicial proceedings*, 3. EXECUTION, 2; MOTIONS AND ORDERS, 9; REPLEVIN, 4.

## ASSAULT AND BATTERY.

EVIDENCE, *tit.*, *in certain actions*, 4.

## ASSIGNMENT.

1. The rule of law, that a cause of action founded on injuries to the person is not assignable, has not been altered by the Code. *Purple v. The Hudson River R. R. Co.*, *Ante*, 33.
2. But that rule has no application to a demand arising upon a contract. *Dana v. Fiedler*, 1 *E. D. Smith's C. P. R.*, 463.
3. Nor to a demand for personal property unlawfully obtained from the owner. *Cass v. The New York & New Haven R. R. Company*. *Id.*, 522.
4. Allegations of a fraud, in a complaint upon contract, do not change the substantial nature of the cause of action, nor render it non-assignable. *Brady v. Bissell*, *Ante*, 76.
5. A bill of sale, of goods in the possession of the bailee of the vendor, is not merely a transfer of a right of action but of the goods themselves; unless, indeed, the bailee has already converted the goods to his own use, or contests the title of the vendor. *Heine v. Anderson*, 2 *Duer*, 318. Compare *Thurman v. Wells*, 18 *Barb.*, 500.
6. Whatever rights or choses in action were the subjects of assignment and transfer before the Code, are so now, and no others. Therefore, the mere right to recover against common carriers for a breach of duty, in negligently losing property intrusted to them, is not assignable, so as to permit the assignee to sue in his own name, notwithstanding the assignment purports to pass the property in the goods as well as the cause of action. *Thurman v. Wells*, 18 *Barb.*, 500. But see *Vogel v. Badcock*, *Ante*, 176; and also, *Campbell v. Perkins*, 4 *Seld.*, 430.
7. It is not necessary to allege the consideration of the assignment by which the plaintiff claims title to personal property, although such assignment was made after the conversion and during the retention. *Vogel v. Badcock*, *Ante*, 176.
8. An assignment of a chose in action is not invalid, as against the

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defendant, in an action brought upon it by the assignee, by reason that it was made without consideration, or that the consideration for which it purports to have been made has not been paid. *Clark v. Downing*, 1 *E. D. Smith's C. P. R.*, 406.

9. When a plaintiff transfers his interest after the commencement of the suit, it rests entirely in the discretion of the court, whether the assignee shall be substituted as plaintiff, under section 121 of the Code. And no such order of substitution will be made, unless special circumstances are shown, to satisfy the court of its propriety or necessity; and in all cases it will be made a condition, that the original plaintiff, the assignor, shall not be examined as a witness on behalf of the assignee. *Murray v. The General Mutual Insurance Company*, 2 *Duer*, 607.
10. An order of the Surrogate, directing the prosecution of an administration bond, and declaring it assigned for the purpose of being prosecuted, is the mode of assignment contemplated by the statute. The Surrogate not being a party to the bond, cannot assign it as obligee. *Baggot v. Boulger*, 2 *Duer*, 160.

ATTORNEY, 5; COMPLAINT, 18; DEPOSITION ON COMMISSION, 1; EXAMINATION OF ASSIGNOR; PARTIES, 1; PARTNERSHIP, 4; WITNESS, *tit.*, *Competency*, 5, 6, 7, 11.

#### ATTACHMENT.

1. An immigrant having left forever his native land, and living in the State of New York, without any determination to reside elsewhere, is a resident. *Heidenbach v. Schland*, 10 *How. Pr. R.*, 477.
2. Where the goods are sold on credit, with an agreement that a specified security should be given, and the purchaser afterwards fails to give the security, the seller may, if the purchaser be a non-resident, have an attachment against him, under the Code. The purchaser is liable to be sued as soon as his agreement to give security has been broken. If in such case judgment were obtained before the credit expired, the courts have sufficient equity powers over their own judgments to postpone the collection of the amount of the judgment until the credit should expire, or to vacate it, if the security agreed on should be given. Thus justice would be done to all parties. It is not necessary, under the Code, that the plaintiffs should have a cause of action for the payment of money merely, to have an attachment, it is enough that "a cause of action exists against the defendant," and that the amount of the claim, and the grounds thereof, are stated. (*Code*, § 229). *Ward v. Begg*, 18 *Barb.*, 139.

8. On a motion to set aside an attachment, affidavits may be read on either side, though the court will not try the merits of the action on conflicting affidavits, nor should the attachment be set aside for every irregularity. *The Bank of Commerce v. The Rutland and Washington Railroad Company*, 10 *How. Pr. R.*, 1. Compare *Hernandez v. Carnobelli*, *Ib.*, 433.
4. When a warrant of attachment is issued under section 231 of the Code, if the sheriff does not choose to levy upon all the property of the debtor, he is bound at his peril to levy upon enough to satisfy the demand; and if, by the result of the sale, the levy should prove inadequate, the sheriff is liable to the attaching creditor for the deficiency. *Ransom v. Halcott*, 18 *Barb.*, 56.
5. In an application for an attachment against a non-resident debtor, it is necessary that all the facts which go to give jurisdiction should be stated in the application; it is not sufficient that they can be inferred argumentatively from what appears in the application. *Payne v. Young*, 4 *Seld.*, 158. See also *Vredenburg v. Hendricks*, 17 *Barb.*, 179. But compare *Renard v. Hargous*, 2 *Duer*, 540.
6. An application for an attachment, under 2 Revised Statutes, 3, section 4, is sufficient, though it state in the disjunctive, "that the debtor had departed from the State, or was concealed within it, with intent to defraud his creditors, or to avoid service," &c. *Van Alstyne v. Erwine*, 1 *Kern.*, 331.
7. The petition in such case is sufficiently verified, if, instead of the ordinary jurat there is indorsed upon it an affidavit setting forth the facts again in detail.—*Ib.*
8. The statute authorizing attachments against the estate of concealed debtors, which requires the testimony of disinterested witnesses, does not require affirmative proof of their freedom from interest; but where nothing appears to show that witnesses are interested, they are presumed to be disinterested; and in a collateral proceeding proof cannot be given to contradict the *prima facie* case made by their testimony before the officer, in order to render his proceeding void. *Ib.*
9. The justices of the Superior Court had authority from January 1, 1830, to July 1, 1847, as *ex officio* Supreme Court Commissioners, to issue attachments against absconding or non-resident debtors, under the revised statutes. *Renard v. Hargous*, 2 *Duer*, 540.

AMENDMENT, 4; CONTEMPT; COURT, 4; JURISDICTION, 5; JUSTICES' COURT, *tit. Attachment.*

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## ATTORNEY.

1. The court may compel an attorney, bringing suits on behalf of a number of persons, as plaintiffs, against one defendant, to disclose the names and residences of his clients; and they may also require him to exhibit his authority to bring the suits. *The 99 Plaintiffs v. Vanderbilt, Ante, 193.*
2. The court will not compel a respectable and responsible attorney to exhibit in the preliminary stages of a suit his authority to appear, or his instructions in respect to continuing or discontinuing the action, where no indicia of fraud are shown. *The Republic of Mexico v. Arrangois, Ante, 437.*
3. The Code has not abrogated the attorney's lien upon a judgment recovered by him, for the amount of his costs. *Ward v. Wordsworth, 1 E. D. Smith's C. P. R., 598.*
4. The defendant obtained judgment against the plaintiff for costs. The defendant's attorney notified the plaintiff that he claimed a lien against the judgment for his costs, but the plaintiff, notwithstanding, paid the judgment to the defendant personally, and it was regularly satisfied of record. On motion of the attorney the satisfaction of the judgment was vacated to permit the enforcement of the lien. *Ib.*
5. The defendant in an action will be allowed to set off a judgment in his favor for costs against a judgment upon a verdict in favor of the plaintiffs, when the latter are shown to be insolvent, notwithstanding they had previously assigned the verdict to their attorney. *Crocker v. Claughly, 2 Duer, 684.*
6. Although the law now provides that candidates for admission to the bar shall be admitted as attorneys and as counselors at the same time, yet the offices are still distinct. A counselor cannot in virtue of a mere retainer as such authenticate the process and proceedings in the cause. Nor under a retainer as attorney merely can a party insist upon a right to perform duties as counselor and claim compensation therefor. Nor does payment of a counsel fee discharge a claim for services as attorney. *Easton v. Smith, 1 E. D. Smith's C. P. R., 319.*
7. The decisions in this State that attorneys may be held liable for fees of the officers of the court, are in conflict with principle, and with the whole current of authorities elsewhere.  
Such a rule should not be extended by analogy.  
A referee, whether in an action at law or in equity, is not an officer for whose fees an attorney is liable. *Judson v. Gray, 1 Kern., 408.*  
CONTEMPT, 6; DEFAULT, 2, 4; JUSTICES' COURT, *tit. default, 2, 4.*



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## ATTORNEY GENERAL.

PARTIES, 10.

## AWARD.

ANSWER, 18, 24; COSTS, 4.

## BAIL.

ARREST, 3; CRIMINAL LAW, *tit. Recognizance and Bail*.

## BANKRUPT DISCHARGE.

ANSWER, 27; LIMITATIONS OF ACTIONS, 2.

## BILL OF PARTICULARS.

COMPLAINT, 2, 18; JOINDER OF ACTIONS, 4.

## CAUSE OF ACTION.

1. "Cause of action" is not synonymous with "chose in action." The breach of duty is the cause of action. In a suit on a bill of exchange payable within this State the cause of action may be said to arise within this State. The Bank of Commerce *a. The Rutland and Washington Railroad Company*, 10 *How., Pr. R.*, 1.
2. An action on the case against the defendants as common carriers for damages, for loss of goods intrusted to them is an action, which, though in form for a wrong, is founded on contract; and a discharge under the bankrupt act of 1841 is a good defence to it. *Campbell a. Perkins*. 4 *Seld.*, 430.

AMENDMENT, 1, 2, 4; ARREST, 4, 5, 6; ASSIGNMENT, 1, 2, 4, 5, 6;  
ATTACHMENT, 18, 30; JOINDER OF ACTIONS; PLEADING, 19.

## CERTIORARI.

A common law writ of certiorari cannot be allowed by a judge or other officer at Chambers; but it is not necessary to give notice of the application for the writ, to the party against whom it is sought. The clause of the Judiciary Act of 1847, authorizing the allowance of writs of certiorari by judges at Chambers, applies to statutory writs exclusively. *Gardner a. Commissioners of Highways of Warren*, 10 *How., Pr. R.*, 181.

## CHAMBERS.

COURT.

## CHATTEL MORTGAGE.

The filing of a chattel mortgage by a clerk in the store of a town clerk left in charge of the town clerk's office during the absence of that officer is valid. (13 *Barb.*, 326.) *Dodge a. Potter*, 18 *Barb.*, 193.

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2. The sheriff is not liable to the mortgagee of chattels for having assumed to sell the whole property in the mortgage chattels, upon execution against the mortgagor, ignoring the lien of the mortgage upon them, although he had notice of the mortgage. Such a sale passes only the interest of the mortgagor, and the mortgagee is not legally prejudiced by it. *Hull v. Carnley, Ante*, 158. S. C. with dissenting opinion of Edwards, J., 1 *Kern.*, 501.
3. A mortgagor of chattels cannot, after sale of the chattels to a third party, sustain an action to cancel the mortgage and notes secured by it, and to enjoin proceedings to enforce it, on the ground of usury in the loan for which it was given. *James v. Oakley, Ante*, 324.
4. *It seems* that the purchaser of personal property subject to a mortgage, cannot avoid the mortgage on the ground of usury. *Ib.*

EVIDENCE, *tit. parol proof to explain, &c.*, 5.

### COMMON CARRIERS.

ASSIGNMENT, 6; EVIDENCE, *tit. in certain actions*, 5; INN-KEEPER.

### COMPLAINT.

1. How far it is necessary or proper to deny in a complaint, facts which are properly matters of defence. *Hunt v. Hudson River Fire Insurance Company*, 2 *Duer*, 481.
2. A complaint to recover for money lent to, and paid, laid out and expended for, the defendant at his request, is sufficient under the Code; though as general in its allegations of the particulars of the cause of action as the old form of a declaration in *indebitatus assumpsit*. If the defendant wishes a more detailed statement, his remedy is to demand a copy of the account or the particulars of the cause of action. *Cudlipp v. Whipple, Ante*, 106.
3. A complaint which merely states that the defendant is justly indebted to the plaintiff for moneys had and received by him to the use of the plaintiff, and that being so indebted, he became liable to pay the amount to the plaintiff, is bad upon demurrer, for the reason that it simply affirms a legal conclusion, without stating as required by the Code the facts which constitute the cause of action. *Lienan v. Lincoln*, 2 *Duer*, 670; *Drake v. Cockroft, Ante*, 203; and *Seeley v. Engell*, 17 *Barb.*, 530.
4. Allegations in a complaint, of circumstances which would be admissible upon the trial as evidence of a fraud on the part of the defendant, for which he was prosecuted, stricken out as irrelevant and redundant. The "facts to be stated, are the facts which the evi-

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- dence upon the trial will prove, not the evidence of the facts. *Wooden v. Strew*, 10 *How. Pr. R.*, 48.
5. In order that the body of defendant may be taken on execution on a judgment rendered in an action for the recovery of a debt fraudulently contracted, the complaint must aver the fraud, and the judgment must find that the fraud was committed. *Harris v. Cone*, 10 *How. Pr. R.*, 259. And compare *Wanzer v. De Baun*, 1 *E. D. Smith's C. P. R.*, 261; *Goodrich v. Dunbar*, 17 *Barb.* 644.
  6. A plaintiff may in some cases be allowed to set up one cause of action in two different counts. *Jones v. Palmer*, *Ante*, 442.
  7. The practice of setting forth a single cause of action in different counts is abolished by the Code. Where a cause of action is thus pleaded, the defendant's remedy is by a motion to strike out, founded on affidavits, not by demurrer. *Lackey v. Vanderbilt*, 10 *How. Pr. R.*, 155.
  8. The allegations of a count, which purports to set out any one cause of action, should state enough to make it good in law. *Landau v. Levy*, *Ante*, 376.
  9. Sufficiency of a complaint drawn under section 162 of the Code, in an action upon a bill of exchange against the acceptor. *Andrews v. The Astor Bank*, 2 *Duer*, 629.
  10. An averment of the making of a promissory note includes delivery to the payee. A complaint which alleges that the defendant made his promissory note in writing, gives a copy of it containing the initial of the plaintiff's christian name, his surname in full, and alleges that there is due to the plaintiff, on the note, a sum named, for which, with interest, the plaintiff claims judgment, is sufficient. *Chappell v. Bissell*, 10 *How. Pr. R.*, 274.
  11. A complaint upon a promissory note which does not aver that the amount claimed thereon is due from the adverse party, and that it is due on the note, is not conformable to section 162 of the Code. It is not sufficient to aver that the amount is due to the plaintiff. If the complaint is not drawn under that section, the pleader must aver a breach, so as to show the default of the defendant. *Keteltas v. Myers*, *Ante*, 403.
  12. A complaint on a promissory note must show the plaintiff's title to the note; and an averment that the note, before it came due, was duly delivered to, and came into the possession of, the plaintiff, without averring by whom it was delivered, or for what purpose, or that it was indorsed, is insufficient. *Parker v. Totten*, 10 *How. Pr. R.*, 233.
  13. *It seems*, that in an action on a bill of exchange payable in mer

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- chandise, an assignment for consideration, by the payee to the plaintiff, should be averred. *Landau v. Levy*, *Ante*, 376.
14. A complaint upon a special contract should set out its provisions, either in form or legal effect, and either allege performance, or state facts which warrant a departure from the terms of the contract, if they have not been duly performed. *Brown v. Colie*, 1 *E. D. Smith's C. P. R.*, 265.
  15. In a suit for damages on the breach of a contract, the complaint is defective unless it alleges an offer or tender of performance on the part of the plaintiff. *Smith v. Wright*, *Ante*, 243; *Dunham v. Mann*, 4 *Seld.*, 508; *Lester v. Jewett*, 1 *Kern.*, 453.
  16. In an action to recover damages for the breach of a covenant, a general allegation in the complaint, that acts have been done "in violation of the defendant's agreement," is a mere averment of a conclusion of law, and is bad upon demurrer. The complaint should show facts from which it appears that the defendant has broken the covenant. *Schenck v. Naylor*, 2 *Duer*, 675.
  17. A complaint in an action to recover the possession of real estate, which merely avers the plaintiff's title to the premises, without stating the facts which prove that the title which plaintiff claims exists, is bad upon demurrer. *Lawrence v. Wright*, *Ib.*, 673.
  18. Where the complaint in an action for the possession of real property gave a description of the premises which embraced nothing whatever;—
 

*Held*, 1. That the complaint contained no facts constituting a cause of action, and the defendant had his election to demur or avail himself of the defect upon the trial. It was not proper that he should apply for a bill of particulars or move to have the pleading made more definite and certain, for the reason that there was no claim set up of which the particulars could have been given, and nothing to be made definite and certain.

2. That to allow the plaintiff to proceed with the trial in such a case, and to permit him, if he established the right to recover, to take a verdict, and then to amend his complaint in conformity with the evidence, would not be just to the defendant.

3. That the complaint was properly dismissed with leave to the plaintiff to amend upon terms. *Budd v. Bingham*, 18 *Barb.*, 494.
  19. In an action under 2 *Rev. Stats.*, 505, § 30, to recover the possession of demised premises for non-payment of rent, the complaint need not allege a demand of payment. No notice of intention to re-enter is necessary in such case, except where there are on the premi-

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- ses sufficient goods and chattels to satisfy the rent. And where it appears on the face of the complaint that there were no goods and chattels upon the premises, as for example where the premises are described as consisting of "a water lot, vacant ground and soil under water," it is not necessary to aver, in so many words, the want of a sufficiency of goods on the premises to satisfy the rent. *The Mayor &c. of New York v. Campbell, Ib., 156.*
20. In an action to recover damages for the wrongful detention of personal property, it is not necessary to set forth the plaintiff's title in the complaint. A general averment of ownership is sufficient, and under it a bill of sale from the former owner may be given in evidence. *Heine v. Anderson, 2 Duer, 318.*
21. What allegations are necessary to support a claim for the delivery of specific personal property, and for damages for its detention. *Vogel v. Badcock, Ante, 176.*
22. In an action for the recovery of the possession of personal property, the complaint, although it claimed only a part of the property mentioned in the affidavit and requisition originally issued to the sheriff, was held good, it appearing that the other part of the property had been taken from the defendant by an attaching creditor before the summons could be served. *Kerrigan v. Ray, 10 How. Pr. R., 213.*
23. A banking association, incorporated under the general banking act, may sue in its corporate name or in the name of its President. *East River Bank v. Judah, Ib., 135.*
24. In an action for a prize drawn in a lottery alleged to be legalized by the laws of the place where it was established, it is necessary, since it is illegal by the laws of this State, to aver and prove that where the ticket was sold the contract was legal. *Thatcher v. Morris, 1 Kern., 437.*
25. In an action against the sureties in an undertaking given by the defendant in an action for the return of specific personal property, it is not necessary to aver the issuing of execution against the original defendant. *Slack v. Heath, Ante, 331.*
26. When an action is founded upon an agreement void by the statute of frauds unless reduced to writing, the fact that it was reduced to writing and subscribed as required by statute, is one of the facts constituting the cause of action, and under the Code must be stated in the complaint. In pleading at law prior to the Code, such an averment was not necessary. *Thurman v. Stevens, 2 Duer, 609; and see Le Ray v. Shaw, Ib., 626.*
27. Where deceased having made a sale of property to defraud credi-

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- tors, the estate being insolvent, the executor or administrator colludes with the fraudulent vendee or claims to regard his title as good and refuses on reasonable request to proceed to test it, a creditor of the estate may join them both as defendants in an action to impeach the sale and have the property administered as assets. A complaint which omits to show the administrator's collusion or his concurrence in upholding the sale, is bad. *Bate v. Graham*, 1 *Kern*, 237.
28. Where two persons had become joint assignees of a lease in fee subject to an annual rent, and the plaintiff, who was the devisee of the lessor, brought an action against both defendants for the whole rent due, and alleged in his complaint that he did not know in what proportion the defendants held the lands, or whether jointly or severally, and prayed judgment against the defendants jointly, if it should turn out they were jointly liable, or severally for their proper portions if their liability was several, and after issue joined it appeared that they were severally liable—*Held*, that the complaint was properly drawn, and that the plaintiff was entitled to recover from each defendant the proper proportion of rent due from him. *Van Rensselaer v. Layman*, 10 *How. Pr. R.*, 505.
29. In a complaint in an action for slander, of two counts, each alleging the speaking of the same words, one was held bad, the other good, by reason of difference in the innuendoes. *Butler v. Wood*, *Id.* 222.
30. Causes of action cannot be said to be separately stated, when it is necessary to recur to the allegations of the count which sets forth one of them, to supply omissions in the count, containing a statement of the other. *Landau v. Levy*, *Ante*, 376.
31. It is essential that the place of trial should be clearly stated in the complaint, and the omission to state it is not like a mere irregularity. This defect in the complaint is not waived by the obtaining of time to answer, nor can it be cured by reference to the summons. The complaint in such case must be amended or stricken out as irregular. But upon motion for such amendment before issue joined, the court will not fix upon a particular county as the place of trial. *Merrill v. Grinnell*, 10 *How. Pr. R.*, 31.
32. To entitle a person to continue an action as representative or successor in interest of a deceased plaintiff under section 121 of the Code, it is necessary to show that he has succeeded to his title. And where the petition asked that the infant son and the devisee in trust of the deceased plaintiff be substituted as plaintiff, or if that could not be done, that the court would decide which of the two was the legal successor and substitute him, and it appeared that the son was

an alien, and the devisee in trust took only a power in trust, not the legal estate. *Held*, that neither one nor both together could be substituted as plaintiff; neither of them was the successor in interest of the deceased plaintiff. *St. John v. Croel*, 10 *How. Pr. R.*, 253.

AMENDMENT; APPEAL, 5; INJUNCTION, 4; JOINDER OF ACTIONS, 1; PLEADING; SURROGATE'S COURT, 2.

### CONFESSION OF JUDGMENT.

JUDGMENT, 15, 16, 17, 18; JUSTICES' COURT, *tit Trial*, 1.

### CONTEMPT.

1. The history of the practice of punishment as for contempt reviewed. *Dusenberry v. Woodward*, *Ante*, 443.
  2. Process of attachment to enforce a surrogate's decree, in a form similar to that used in Chancery in analogous cases, approved.  
It is not necessary that the attachment should recite all the proceedings in such case. If the cause is substantially stated, and one in a matter of which the surrogate has jurisdiction, it is *prima facie* protection to all engaged in the arrest. *Seaman v. Duryea*, 1 *Kern.*, 324.
  3. An attachment may issue against a guardian for non-compliance with the surrogate's decree striking the balance upon a final accounting, and ordering payment of the amount. *Ib.*
  4. The failure of a witness to attend a trial pursuant to subpoena should be excused upon slight grounds where the notice given him is unreasonably short. *Chalmers v. Melville*, 1 *E. D. Smith's C. P. R.*, 502.
  5. *It seems* that a defendant in contempt for non-compliance with an order requiring him to satisfy part of the plaintiff's claim admitted to be just, may show his inability to comply as an excuse for the apparent contumacy. *Meyers v. Trimble*, *Ante*, 399.
  6. Where the attorney of a party proceeded with an appeal in violation of an order staying proceedings on the appeal, a motion for a warrant of attachment against the party himself was refused. The court will not presume that any illegal act of an attorney in conducting a suit has the party's sanction, unless it be expressly proved that he approved or directed it. *Harris v. Clark*, 10 *How. Pr. R.*, 415.
  7. The propriety of an injunction issued by the court, upon notice, will not be reviewed on appeal from an order granting attachment for disobedience to it. The defendant should have appealed from the injunction itself. *Grimm v. Grimm*, 1 *E. D. Smith's C. P. R.*, 190.
- MOTIONS AND ORDERS, 6; SATISFACTION OF PART OF PLAINTIFF'S CLAIM, 8; SESSIONS, 6; SUPPLEMENTARY PROCEEDINGS, 1, 2.

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## CORPORATION.

1. A corporation is composed of the aggregate body of individual corporators under the charter; and is in no sense a trustee for the individual corporators. *New York & New Haven Railroad Company v. Schuyler*, *Ante*, 417.
2. The theory of religious corporations and the power of Courts of Equity over their officers discussed. *Robertson v. Bullions*, 1 *Kern.*, 243.
3. An order of the chancellor according to the provisions of 3 *Rev. Stats.*, 210, § 11, was never necessary to enable a religious corporation purchasing land to execute a mortgage for the purchase money. *South Baptist Society of Albany v. Clapp*, 18 *Barb.*, 35.
4. One foreign corporation may sue another in the courts of this State upon a cause of action arising in it. *The Bank of Commerce v. The Rutland & Washington Railroad Company*, 10 *How. Pr. R.*, 1.
5. A suit against a foreign corporation may be brought either under the Code or under the provisions of 2 *Revised Statutes*, 459, § 15, &c., which are not repealed by the Code. *Ib.*
6. Sales of unclaimed freight, by express companies,—provided for. *Laws of 1855*, 958, *ch.* 523.
7. Where the officers of a stock company fraudulently issued certificates of stock to a large amount, making certificates of a greater number of shares than the charter authorized, in consequence of which the company became insolvent, and made an assignment for the benefit of creditors, an injunction forbidding the transfer of stock by the officers of the company, was granted, and continued until the questions arising out of the fraud could be disposed of either by the legislature or the courts. *The People v. Parker Vein Coal Company*, 10 *How. Pr. R.*, 186; *S. C.* affirmed, *Ib.*, 543.
8. Per MORRIS, J. Such certificates of stock are not binding on the company. The remedy of the holders of the stock is against the party issuing them. *Ib.* 543. But see *N. Y. & New Haven R. R. Co. v. Schuyler*, *Ante*, 417.
9. In an action brought by a corporation to recover a sum of money loaned to the defendant, the latter, having had the benefit of the contract of loan, cannot be permitted to avail himself of the defence that the corporation plaintiff had no authority under the terms of its charter to make the loan. *The Steam Navigation Company v. Weed* 17 *Barb.*, 378.
10. Otherwise, perhaps, when the contract was entered into by the corporation plaintiff in violation of an express statutory prohibition. *Ib.*



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11. Suits against the stockholders of plank road and turnpike corporations, to enforce their individual liability upon the contracts of the company, may be brought in the Supreme Court after judgment had against the corporation, and execution thereon is returned unsatisfied. The court shall have jurisdiction in such case, to enforce payment by any stockholder, of arrears due on his stock, to ascertain all the debts of the corporation for which stockholders are individually liable, and to apportion all the indebtedness among the stockholders, and enforce payment by judgment and execution. Stockholder, when a creditor, may unite as plaintiff in such suit. The Court in such suit to possess the powers exercised by Chancery in proceedings against corporations. Limitations of time in which creditors may come in as plaintiffs. Distribution of moneys recovered. *Laws of 1855, 736, ch. 390.*
  12. If it appears from the complaint filed by a creditor of a manufacturing corporation in the county of Herkimer, against a stockholder, to enforce the individual liability of the latter, that the company was dissolved under the act of April 16, 1852, that fact will be fatal to the action. *Herkimer County Bank v. Furman, 17 Barb., 116.*
  13. But if the complaint merely alleges the dissolution of the corporation, without showing that it was dissolved under that act, the court will not on demurrer assume that it was. *Ib.*
  14. The act of April 5th, 1849, respecting examinations into the solvency of corporations, intends a rapid and summary remedy; and delay to save the interests of the stockholders is not to be favored. In the matter of the Knickerbocker Bank, 10 *How. Pr. R.*, 341.
- ANSWER, 10, 11; INJUNCTION, 10; MANDAMUS, 2; PLEADING, 28; SERVICE AND PROOF OF, 7; SUPPLEMENTARY PROCEEDINGS, 3; TRIAL, *tit. Place of trial*, 2.

## COSTS.

1. The old Chancery fee bill has not been repealed by the Code. It is still in force, but it is only applicable to proceedings had prior to July, 1851, in equity suits commenced before the Code. *Curtis v. Leavitt, Ante*, 118.
2. *Held*, in an equity suit commenced before the Code, that costs of all proceedings prior to July, 1851, must be taxed according to the fee bill; those of all subsequent proceedings according to the Code. *Ib.*
3. In actions at Common Law, pending in Courts of Record when the Code took effect, and tried afterwards, the right to costs, and the rate of compensation, are governed by the statutes in force at the time the Code took effect; but costs of proceedings subsequent to the ver-

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- dict, to review decisions made at the trial, and taken in the mode prescribed by the Code, are governed by the provisions of the Code. *McMasters v. Vernon, Ante*, 179.
4. In an action brought against several joint defendants to vacate an award of arbitrators, the defendants appeared by separate attorneys, and interposed separate demurrers, which were allowed. *Held*, that each defendant was not entitled of course to a full bill of costs, and that they erred in entering up judgment with costs without notice of settlement to the plaintiff. *Wood v. Brooklyn Fire Ins. Co.*, 10 *How. Pr. R.*, 154.
  5. It appearing upon the trial of an action brought against seven defendants, that five of them only were liable, the plaintiff moved to strike out the names of the other two; his motion was granted, with the addition that he pay their costs, and judgment was rendered in favor of the two for their costs, and against the five for debt and costs. *Held*, that the allowance of costs to the two defendants severed was properly made. *Marks v. Bard, Ante*, 63. Compare *Woodburn v. Chamberlin*, 17 *Barb.*, 446.
  6. In an action for a tort, against two defendants, when a verdict is rendered in favor of one defendant, and against the other, the defendant prevailing is entitled as matter of course, to costs, under section 305 of the Code. *Decker v. Gardiner*, 4 *Seld.*, 29.
  7. Upon a bill of interpleader, the unsuccessful claimant adjudged to pay all costs recovered by the plaintiff, and also all costs of his co-defendant, both upon the bill and in an action at law between the claimants upon the same subject. *Miller v. DePeyster, Ante*, 234.
  8. Where the answer does not put in issue the plaintiff's right to possession of lands, but only his actual possession, the title of the land is not in issue so as to entitle the plaintiff to costs on recovering less than \$50, although some evidence is adduced upon the trial which tends to show the plaintiff's title; *e. g.*, where he introduces his title-deeds. *Burnet v. Kelly*, 10 *How. Pr. R.*, 406.
  9. The defeated party in an action in the nature of a writ of *quo warranto*, is liable to the other, as well for the ordinary costs of the action, as for an extra allowance. *The People v. Cook*, 4 *Seld.*, 67.
  10. Where a married woman, suing for a divorce, appears by her next friend, the requiring the next friend to give security for costs is a regulation of practice entirely the creature of the court, and under its control. As a general rule the husband is to pay the costs in these cases, whether he succeeds or fails. At the termination of the suit, it is true, the court may decree the wife to pay the costs; but

this never would be done unless there were great misconduct in commencing or prosecuting the suit. The only thing necessary to provide against, is such misconduct as would subject the wife to the payment of costs. To accomplish this, it is enough to allow the wife to appear by any next friend whom the court may appoint on her application, without security, and to allow him to continue to act until some abuse occurs, and then to remove him and dismiss the complaint unless he give security, or another next friend be substituted, whose character and responsibility will be a protection against further abuse. *Thomas v. Thomas*, 18 *Barb.*, 149.

11. In an action upon a contract, at issue and noticed for trial, the plaintiff accepted the offer of the defendant to allow him to take judgment for \$49.50. *Held*, that the defendant was entitled to costs; and that the entry of the costs by the clerk without order of the court, was regular, although execution had been issued by the plaintiff, and the judgment had been paid by the defendant, the judgment not having been satisfied of record. *Johnson v. Sagar*, 10 *How. Pr. R.*, 552.
12. Where judgment for the plaintiff in the Marine Court is reversed in the Common Pleas, and judgment is not ordered for the defendant, but the plaintiff is left to prosecute his action further, if so advised, the defendant is not entitled to have the costs incurred by him, in defending the suit in the Marine Court, inserted in the adjustment of the costs, on appeal. *Ellert v. Kelly*, 10 *How. Pr. R.*, 392.
13. On the reversal of a judgment of a justice of a district court, the appellant is entitled to those costs of the court below to which he would have been entitled, if the proper judgment had been rendered there. *Jacks v. Darrin*, *Ante*, 232.
14. A motion for a new trial, on the ground that the verdict is against evidence, raises an issue of fact. The party taking costs is entitled to \$10 term fee, for every term at which the case is necessarily on the calendar and not reached, or postponed, exclusive of that at which it is heard, and \$12, trial fee. *Mechanics' Banking Association v. Kiersted*, 10 *How. Pr. R.*, 400.
15. On motion for a new trial, costs as on a motion and not as on a trial are to be allowed. (*Ellsworth v. Gooding*, 8 *How. Pr. R.*, 1; dissented from, per HUBBARD, J.) *Potsdam and Watertown R. R. v. Jacobs*, 10 *How. Pr. R.*, 453.
16. On the trial at a circuit, a verdict was directed for the plaintiff, subject to the opinion of the court, at general term. A case was then made and argued, and judgment ordered for the plaintiff, with costs.—*Held*, that the plaintiff was entitled to a trial fee, as in case

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- of a trial of an issue of law, besides his disbursements. *Wilcox a. Curtiss, Ib.*
17. Where, after argument upon the merits, in the Court of Appeals, an appeal was dismissed with costs.—*Held*, that the respondent was entitled to general costs, not merely costs of the motion to dismiss. *Webb a. Norton, Ib.* 117.
  18. Where, upon judgment for plaintiff, on demurrer, leave to answer is granted, upon payment of the costs of the demurrer, the costs intended are as upon a motion. *Roberts a. Clark, Ib.*, 451.
  19. An appeal from the decision of the court, upon a demurrer, is an appeal from an order on an enumerated motion, and the party prevailing is entitled to the full costs of appeal. *Richards a. Cook, 1 E. D. Smith's C. P. R.*, 386.
  20. Taxation of costs and the insertion of their amount in the entry of judgment, are not stayed by an appeal with security. *Curtis a. Leavitt, Ante*, 118.
  21. In entering judgment in the court below, upon remittitur from the Court of Appeals, the costs of the appeal should be adjusted by the clerk of the court below, and inserted in the entry of judgment in that court. *The Union India Rubber Company a. Babcock, Ante*, 262.
  22. Where an appellant from the special to the general term deposits a sum of money instead of giving an undertaking, and appeals from the general terms to the Court of Appeals, giving the proper undertaking with sureties, the money so deposited must remain in court until a final determination in the Court of Appeals. *Parsons a. Travis, 2 Duer*, 659.
  23. The statute respecting security for costs (2 *Rev. Stats.* 260), construed. *Butler a. Wood, 10 How. Pr. R.*, 313.
  24. After an order overruling a demurrer, with leave to answer on payment of costs, the defendant while in default of the payment is not entitled to security of costs from the plaintiff, if the plaintiff becomes a non-resident. *Ib.*
  25. Where, under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the qualification of one of the sureties upon exceptions, is sufficient. *Riggins a. Williams, 2 Duer*, 678.
- DISCONTINUANCE, 1, 5, 6; MOTIONS AND ORDERS, 4; STAY OF PROCEEDINGS, 4: TRIAL, *tit.*, *Nonsuit*, 5.

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## COUNT.

AMENDMENT, 1, 2; ANSWER, 26; APPEAL, 5; COMPLAINT, 6, 7, 8, 30; CRIMINAL LAW, *tit. Indictment*, 3, 9.

## COUNTER CLAIM.

1. What constitutes a counter claim under the Code. Gleason *a. Moen*, 2 *Duer*, 639.
  2. Instance of a counter claim held bad on demurrer. Berdell *a. Johnson*, 18 *Barb.*, 559.
  3. In an action by a landlord to recover rent, the tenant cannot set up as counter claim a mere trespass upon the demised premises and the destruction of personal property, committed by the landlord. Drake *a. Cockcroft*, *Ante*, 203. And see the Mayor, &c. of New York *a. Mabie*, 2 *Duer*, 401.
  4. Nor can he set off or recoup such damages. Levy *a. Bend*, 1 *E. D. Smith's C. P. R.*, 169. But compare Downing *a. De Klyn*. *Ib.* 563.
  5. Whether in actions at law the Code has extended the doctrine of recoupment to any cases to which it did not previously apply; *Query?* Drake *a. Cockcroft*, *Ante*. 203.
- DISCONTINUANCE, 2, 3; EXAMINATION OF PARTIES, 2; PLEADING, 18.

## COUNTY COURT.

1. County courts are not inferior courts within the rule which requires that everything requisite to give jurisdiction should appear specifically upon the record. Although their jurisdiction is in certain respects limited by statute, they are nevertheless courts of record proceeding according to the course of the common law, and having each a clerk and a seal. They are courts of general jurisdiction as to kinds or classes of civil actions. They are in their nature, constitution, machinery, and practice, common law courts. They are held by judges, and practised in only by admitted attorneys. Their records come within the class of records entitled, when duly authenticated, under the act of Congress, to full faith and credit in other States. Jurisdiction will therefore be intended in favor of county courts when the contrary does not expressly appear. Therefore, where on appeal from a judgment of a county court, it was objected that it did not appear that the defendants were all residents of the county at the time of the commencement of the action, —*Held*, that their jurisdiction would be presumed, and the judgment must be affirmed. Kundolf *a. Thalheimer*, 17 *Barb.*, 506.
2. The county judge of each of the counties of the State authorized to

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appoint a crier of the courts of record of the county, to hold office during pleasure of such county judge. *Laws of 1855*, 973, *ch.* 530.

EVIDENCE, *tit. Judgments and Judicial Proceedings*, 3.

## COURT.

1. There is but one Supreme Court, whether the judges holding it be at general or special term; and powers conferred by statute may be exercised at either term, unless there be some statute specially restricting the power of the court. *Tracy v. Talmadge*, *Ante*, 460. *Anonymous v. Anonymous*, 10 *How. Pr. R.*, 353.
2. Where, under an order of special term, that the report of a referee be confirmed, unless cause to the contrary be shown within eight days, a party filed exceptions to the referee's finding, and an order was entered, that all the proofs and testimony taken before the referee come before the court on the hearing of the exceptions, and the cause was placed on the general term calendar for hearing—a motion that it be struck off, on the ground that it should be heard in the first instance at special term, was denied.  
The motion to set aside the report of the referee might properly be made either at special or general term, according to convenience. *Tracy v. Talmadge*, *Ante* 460.
3. In the Supreme Court, a motion to dissolve an injunction, granted by a judge at chambers, may be made directly to the court, without a prior application to the same judge to revoke it. Such was the old practice, and section 225 of the Code, authorizing an application to a judge out of court, is merely permissive, and does not abridge the general jurisdiction of the court. *Woodruff v. Fisher*, 17 *Barb.*, 224.
4. So of a motion to discharge an attachment. *Bank of Commerce v. The Rutland and Washington Rail Road Company*, 10 *How. Pr. R.*, 1.
5. One justice of the Supreme Court, sitting at special term, will not set aside an order staying proceedings made by another justice at special term, on the ground that it was improvidently granted. *Harris v. Clark*, 10 *How. Pr. R.*, 415.
6. The plaintiff sued in the Supreme Court upon one of two promissory notes, given upon the same transaction and consideration, and while the question of fraud raised by the defence was at issue there, he sued upon the other note in the marine court, and judgment was there had upon the same issue for the defendants. The defendant showing this by a supplemental answer in the first action,—*Held*, by

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the Supreme Court, that the same question having been decided between the same parties in a court of competent jurisdiction, judgment must be for defendant accordingly. *Higgins v. Mayer*, *Id.* 363. CERTIORARI; CRIMINAL LAW, *tit. Trial*, 4, 5, 6; IMPRISONMENT; SEE ALSO VARIOUS COURTS; STAY OF PROCEEDINGS, 3.

## COURT OF APPEALS.

APPEALS, 6, 7, 8, 10, 11, 12, 16; JURISDICTION, 6, 7; CERTIORARI; CRIMINAL LAW, *tit. Trial*, 4, 5, 6; IMPRISONMENT; SEE VARIOUS COURTS; STAY OF PROCEEDINGS, 3.

## COVENANT.

Recovery of judgment in an action for breach of covenant and satisfaction thereof, is a bar to an action for other breaches of the same covenant, which occurred before the first action was brought. *Coggins v. Bulwinkle*, 1 *E. D. Smith's C. P. R.*, 434.

COMPLAINT 16; EVIDENCE, *tit. In certain actions*, 3.

## CRIMINAL LAW.

[ACCESSORY; ACQUITTAL; APPEAL, 8; OATH; PERJURY; SESSIONS, 37.]

*I. Indictment.*

1. A party ought not to be indicted unless the evidence before the grand jury is sufficient in degree to convict if unexplained. *The People v. Baker*, 10 *How. Pr. R.*, 567.
2. An indictment should be quashed when it clearly appears by affidavit that it was found by the grand jury without adequate evidence to support it. *The People v. Restenblatt*, *Ante*, 268.
3. One good count in an indictment is sufficient to support a general verdict of guilty, however defective the others may be. *The People v. Stein*, 1 *Parker's Cr. R.*, 202. And see *Baron v. The People*, *Id.* 246.
4. Form of an indictment for perjury committed in falsely swearing that usurious interest was taken in discounting a promissory note. *The People v. Burroughs*, 1 *Parker's Cr. R.*, 211.
5. Averment of *mutual* promises of marriage not necessary in an indictment drawn under the act of 1848, to punish seduction as a crime. *Crozier v. The People*, 1 *Parker's Cr. R.*, 453.
6. Necessary averments in an indictment for receiving embezzled or stolen goods. *The People v. Stein*, *Parker's Cr. R.*, 202. *The People v. Johnson*, *Id.* 564.
7. An indictment charging the defendant with two distinct offences to

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- which different punishments are attached, is bad for duplicity. *Reed v. The People*, 1 *Parker's Cr. R.*, 481.
8. Form of indictment for petit larceny charged as a second offence. *The People v. Caesar*, 1 *Parker's Cr. R.*, 645.
  9. Held at circuit, that on an indictment which contains several counts charging the same offence in different forms, the prosecution is not compellable to elect upon which they will proceed. *The People v. Austin*, 1 *Parker's Cr. R.*, 154.
  10. The defendant may avail himself of the omission of any material averment in an indictment, by demurrer, writ of error, or motion in arrest of judgment. *The People v. Johnson*, 1 *Parker's Cr. R.*, 564.

SESSIONS, 8.

*II. Recognizance and Bail.*

1. On an application to be admitted to bail after indictment the defendants cannot introduce evidence tending to show their innocence of the offence charged. *The People v. Baker*, 10 *How. Pr. R.*, 567.
2. The court will in all cases, capital or otherwise, and after as well as before indictment, admit to bail, when upon an examination of the testimony under which the accused is held, the presumption of guilt is not strong—and they are particularly called upon to bail in all cases when the presumptions are decidedly in favor of the innocence of the accused. *The People v. Baker*, 10 *How. Pr. R.*, 567.
3. A recognizance to appear and answer to a criminal charge must be to the next court having cognizance of the offence, and in which the prisoner may be indicted; and a recognizance to appear at court subsequent to the next court,—*Held*, void. *The People v. Mack*, 1 *Parker's Cr. R.*, 567.
4. A recognizance taken pursuant to 2 *Rev. Stats.*, 746, § 24, must be entered in the minutes of the court; and the entry must contain all the substantial parts of the indebtedness. An entry of the fact that a recognizance was taken, is not sufficient. *The People v. Graham*, 1 *Parker's Cr. R.*, 141.
5. Provisions of the Code applied to all recognizances forfeited in any court of General Sessions of the peace, or of Oyer and Terminer; and all laws, or parts of laws, conflicting with such application repealed. Costs upon proceedings upon forfeited recognizances not chargeable to the mayor, commonalty, aldermen, or supervisors of New York City, by the prosecuting officer. *Laws of 1855*, 306; *ch.* 202.

*III. Evidence.*

1. Where two persons are jointly indicted, one is not admissible as witness, either for or against the other, until he has first been ac-



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- quitted or convicted. This rule is not on the ground of interest. Where one co-defendant in an indictment had been examined on the trial, without being previously discharged from the record, a new trial was ordered. *The People v. Donnelly*, *Ante*, 459.
2. A person convicted of perjury is not restored to competency as a witness by being pardoned. *Houghtaling v. Kelderhouse*, 1 *Parker's Cr. R.*, 241.
  3. On the trial of defendant for murder his sworn statement voluntarily made after his arrest on the examination of another party then charged with the offence, is admissible against him. *The People v. Thayer*, 1 *Parker's Cr. R.*, 595.
  4. Statements made by a person under oath before a coroner's inquest, but voluntarily, and before he was himself accused, are admissible against him on his subsequent trial for murder. *The People v. Hendrickson*, 1 *Parker's Cr. R.*, 406.
  5. It seems that on a trial for incest, the declaration of the accused are competent evidence on the question of consanguinity. *The People v. Harriden*, 1 *Parker's Cr. R.*, 344.
  6. What preliminary evidence is necessary to introduce dying declarations. *People v. Knickerbocker*, 1 *Parker's Cr. R.*, 302.
  7. Dying declarations admitted under certain circumstances; it appearing that the declarant expected at the time to die, although her physicians had not expressed to her any such expectation. *The People v. Grunzig*, 1 *Parker's Cr. R.*, 299. Compare also *The People v. Knickerbocker*, 1 *Parker's Cr. R.*, 302.
  8. Circumstantial evidence, and the nature and degrees of presumptions, considered. *People v. Videto*, 1 *Parker's Cr. R.*, 603.
  9. There is a presumption that every person is sane; and the defence of insanity must be supported by affirmative proof. *People v. Robinson*, 1 *Parker's Cr. R.*, 649. See also *Lake v. The People*, *Ib.*, 495.

EVIDENCE, *tit. Presumptions*, 4; *tit. Admissions*, 2.

## IV. Trial.

1. The proper practice in respect to the challenging of jurors, defined. *Carnal v. The People*, 1 *Parker's Cr. R.*, 272; *People v. Knickerbocker*, 1 *Ib.*, 302; *People v. Henries*, 1 *Ib.*, 579; *People v. Thayer*, 1 *Ib.*, 595; *Colt v. The People*, 1 *Ib.*, 611.
2. And in respect to the trial of challenges for favor. *Smith v. Floyd*, 18 *Barb.*, 522; *Carnal v. The People*, 1 *Parker's Cr. R.*, 272.
3. Where a large number of additional jurors were summoned in the initiatory proceedings of a murder trial, the refusal of the court to allow delay of two or three days, to enable the prisoner's counsel to examine the new list of additional jurors was held a matter in the dis-

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cretion of the court, and not the subject of an exception. *Colt a. The People*, 1 *Parker's Cr. R.*, 611.

4. In criminal cases the jury are judges of the law as well as of the fact. *Per* WALWORTH, J., in *People a. Thayers*, 1 *Parker's Cr. R.*, 595, and in *People a. Videto*, 1 *Ib.*, 603.
5. It is the better opinion that the jury are no more judges of the law in criminal cases than in civil. *Per* HAND, J., in *Safford a. The People*, 1 *Parker's Cr. R.*, 474.
6. Except in a criminal prosecution for libel. *Per* PARKER, J., in *People a. Finnegan*, 1 *Parker's Cr. R.*, 147.
7. The practice upon the separate trial of persons jointly indicted for felony. *The People a. McIntyre*, 1 *Parker's Cr. R.*, 371; *The People a. Stockham*, *Ib.*, 424.
8. Under the Revised Statutes, exceptions may be taken on a criminal trial in the same manner as in civil cases. *Safford a. The People*, 1 *Parker's Cr. R.*, 474.

#### V. Writ of Error.

1. The appeal to the Supreme Court and Court of Appeals, from a conviction in the courts of Oyer and Terminer of the State, or the General Sessions of the City of New York, for a capital offence, or for one punishable as a minimum punishment, by imprisonment for life, by a writ of error with a stay of proceedings, is a matter of right. The appellate court may order a new trial, although no exception was taken below. *Laws of 1855*, 613, *Ch.* 337.
2. The distinction between a bill of exceptions and a motion in arrest of judgment, or writ of error, in criminal practice. *The People a. Stockham*, 1 *Parker's Cr. R.*, 424.
3. When a court of Oyer and Terminer will grant a writ of error and stay of proceedings, upon a capital conviction. *The People a. Hendrickson*, 1 *Parker's Cr. R.*, 396; and see *Colt a. The People*, *Ib.*, 611, and *Laws of 1855*, 613, *Ch.* 337.
4. Upon a final judgment in the Oyer and Terminer, a writ of error is a writ of right, and brings before the court above the bill of exceptions, with a transcript of the record. *Safford a. The People*, 1 *Parker's Cr. R.*, 474; see *Laws of 1855*, 613., *Ch.* 337.
5. The personal appearance of the accused on the argument and at the decision, upon a writ of error brought to reverse a judgment in a capital case, is not necessary to give the appellate court jurisdiction. *The People a. Clark*, 1 *Parker's Cr. R.*, 360.
6. The decision of the jury upon a matter of fact cannot be reviewed on a writ of error. *Colt a. The People*, 1 *Parker's Cr. R.*, 611.

33      *Tit. Indictment*, 10; *APPEAL*, 8.

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VI. *New Trial.*

1. Affidavits of jurors inadmissible, on a motion for a new trial on the ground of misconduct in the jury. *The People v. Carnal*, 1 *Parker's Cr. R.*, 256.
2. What irregularities in the conduct of the jury are grounds for a new trial. *The People v. Carnal*, 1 *Parker's Cr. R.*, 256.

VII. *Judgment.*

1. Requisites of the record in cases of summary conviction. *The People v. Phillips*, 1 *Parker's Cr. R.*, 95. And see *Morris v. The People*, *Id.*, 441.
2. The entry of judgment of conviction for a statutory offence must state as required by 2 Revised Statutes, 783, section 5, the offence for which the conviction is had. And this provision is not complied with, by simply stating that the prisoner is convicted of a misdemeanor. But the particular offence must be designated. *Cavanagh's Case*, 10 *How. Pr. R.* 27; *S. C.*, 1 *Parker's Cr. R.*, 588.
3. In what cases a criminal punishable corporeally must be present when judgment is rendered against him. *People v. Clark*, 1 *Parker's Cr. R.*, 360.
4. Entry of judgment in case of felony is irregular, unless it appear upon the record that the prisoner was present, and the court demanded what he had to say why judgment should not be pronounced against him. *Query.* Whether the court have power to amend the record in such case. *Safford v. The People*, 1 *Parker's Cr. R.*, 474.
5. The power of the court to expunge its sentence passed upon a person convicted of crime, for irregularity, and to pass sentence anew—asserted. *Miller v. Finkle*, 1 *Parker's Cr. R.*, 374.
6. The record of a commitment for vagrancy by a police justice of the city of New York must be filed in the office of the clerk of General Sessions.

## Form of the record.

The vagrant can be discharged before the expiration of the term only by habeas corpus, or by order of two governors of the almshouse. *Laws of 1855*, 451, *Ch.* 268.

## HABEAS CORPUS, 3, 4; SESSIONS, 2.

VIII. *Pardon.*

1. Where a criminal has been conditionally pardoned, he may, upon breach of the condition, be remanded to prison, and the execution of the original sentence may be enforced, by the court in which he was convicted, or by any court of superior criminal jurisdiction. *The People v. Potter*, 1 *Parker's Cr. R.*, 47.

*Tit. Evidence*, 2.

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## DAMAGES.

1. Distinction between liquidated damages and penalty. *Cotheal v. Talmadge*, 1 *E. D. Smith's C. P. R.*, 573.
  2. When a contract is such that the damages, in case of a violation of it, will be uncertain in their nature and amount, and the parties have stipulated that, in the event of a breach, a certain sum shall be paid by the party in default as liquidated damages, they will be regarded as having so intended, and that sum will be treated as the measure of damages. *Mundy v. Culver*, 18 *Barb.*, 336.
  3. The rule of damages in an action for the breach of a special contract for the delivery of merchandize on a specified day. *Dana v. Fiedler*, 1 *E. D. Smith's C. P. R.*, 463.
  4. Of the rule of damages in an action brought by a parent for the loss of service of his child, in consequence of an injury received through negligence of defendant's servant. *Gilligan v. The New York & Harlem Rail Road Company*, 1 *E. D. Smith's C. P. R.*, 453.
  5. In a suit for libel, the damages should be a full compensation for the injury, and nothing more, unless the jury be satisfied that the defendant was influenced by *actual* malice, or deliberate intention to injure plaintiffs; but if the jury were satisfied of such actual malice, vindictive damages may further be given. *Taylor v. Church*, 4 *Seld.*, 452.
  6. In an action for libel where actual malice has been proved, the jury are at liberty to give vindictive damages. *Fry v. Bennett*, *Ante* 289; *Taylor v. Church*, 1 *E. D. Smith's C. P. R.*, 279.
  7. Vindictive damages may also be given in an action for the seduction of plaintiff's daughter. *Knight v. Wilcox*, 16 *Barb.*, 212.
- EVIDENCE, *tit. Opinions and Belief of Witnesses*, 3; *tit. In Certain Actions*, 7, 8; JOINDER OF ACTIONS, 3, 4; SATISFACTION OF PART OF PLAINTIFF'S CLAIM, 5; TRIAL, *tit. Verdict*, 1; *tit. New Trial*, 2.

## DECREE.

JUDGMENT; MORTGAGE, 2, 4.

## DEFAMATION.

ANSWER, 22, 29, 30, 31, 32, 33; COMPLAINT, 29; DAMAGES, 5, 6. EVIDENCE, *tit. Hearsay*; *tit. In Certain Actions*, 9, 10. PARTIES, 18.

## DEMURRER.

1. Defendant properly joined cannot demur to the complaint for the misjoinder of another defendant. *Pinckney v. Wallace*, *Ante*, 82.
2. An answer which does not contain new matter constituting a coun-

- ter claim, is not demurrable. *Perking v. Farnham*, 10 *How. Pr. R.*, 120; *Herr v. Bamberg*, *Id.*, 128; *Heaton v. Wright*, *Id.*, 79; *Contra*, *Kneedler v. Sternbergh*, *Id.*, 57.
3. But by the amendment of 3d March, 1855, plaintiff may demur to the answer for insufficiency, stating in his demurrer the grounds thereof, and he may demur to one or more of several defences or counter claims set up in the answer, and reply to the residue. *Laws of 1855*, 54, *ch.* 44.
  4. When the want of a statement of facts sufficient to constitute a cause of action, is the only cause of demurrer to a complaint, it is a sufficient assignment of the grounds of the demurrer to state simply that the complaint does not state facts sufficient to constitute a cause of action. Section 145 only requires that the demurrer shall specify distinctly one or more of the six causes of the demurrer enumerated in section 144. In the Superior Court this may be considered as settled. *Paine v. Smith*, 2 *Duer*, 298.
  5. Where a demurrer to an answer, containing two defences, one of which was good, and the other bad, purported to be to the whole answer, but it was evident from the assignment of grounds of the demurrer, that it had reference to the second defence only—*Held*, that it was not error, under the liberal mode of construing pleadings enjoined by the Code, to construe it as being substantially limited to the badly pleaded defence, and to render judgment allowing it, accordingly. *Matthews v. Beach*, 4 *Seld.*, 173.
  6. Where a demurrer to a complaint founded upon the objection that the complaint does not state facts sufficient to constitute a cause of action, does itself admit facts sufficient to constitute the cause of action, the admission is sufficient to sustain the complaint, upon the argument of the demurrer. *Richards v. Edick*, 17 *Barb.*, 260. Compare *Ayres v. Covill*, 18 *Barb.*, 260.
  7. A demurrer to a complaint, based upon the sixth sub-division of section 144 of the Code, can only be sustained where the complaint presents defects so substantial in their nature and so fatal in their character as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever. (3 *How. Pr. R.*, 280). Defects merely formal, and which under the former practice were the appropriate subjects of a special demurrer, cannot now be corrected by demurrer. *Richards v. Edick*, 17 *Barb.*, 260.
  8. On a demurrer that causes of action are improperly joined, the defendant cannot avail himself of the objection that the causes of action are not separately stated. *Moore v. Smith*, 10 *How. Pr. R.*, 361.

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APPEAL, 2, 3, 17; COMPLAINT, 7; CRIMINAL LAW, *tit. Indictment*, 10; CORPORATION, 12; COSTS, 18, 19; JUSTICES' COURT, *tit. Pleadings*, 8, 9, 10; PLEADING.

### DEPOSITION DE BENE ESSE.

1. *It seems* that the statement regulating the taking of depositions *de bene esse*, and requiring the officer to insert therein every answer of the witness examined which either party shall require to be included, is complied with by confining the direction to *answers*, leaving the officer to exclude questions in his opinion illegal and irrelevant. And a party is not empowered by this statute to go into a course of irrelevant inquiry, and have answers thereto included in the deposition. *Gibson v. Pearsall*, 1 *E. D. Smith's C. P. R.*, 90.
2. What is *satisfactory proof* of the inability of a witness to attend a trial for the purpose of rendering his deposition taken *de bene esse*, admissible. *Fry v. Bennett*, *Ante*, 289.
3. Testimony taken conditionally is admissible upon the trial notwithstanding that one of the original plaintiffs has died, and the suit is continued, (under section 121 of the Code), by the survivor;—and notwithstanding the witness may have returned to the State since his examination, if he is not within the State at the time of the trial. *Markoe v. Aldrich*, *Ante*, 55.

TRIAL, *tit. New Trial*, 7.

### DEPOSITION ON COMMISSION.

1. In an action upon a joint contract against three defendants by an assignee of the demand, two of the defendants only answering, the two who answered were allowed a commission to take the evidence of their co-defendant who was out of the State. When a party has a material witness not within the reach of subpoena, he is entitled to a commission, even where the witness is a party to the action, unless it be made to appear that his examination cannot be received upon the trial. *Shufelt v. Power*, 10 *How. Pr. R.*, 286.
2. A party is not called on to risk loss of original papers by annexing them to a commission issued to take testimony respecting them; and where, in the examination of witnesses by commission as to an original paper, a copy is annexed to the interrogatories, that they may testify intelligently regarding it, the evidence is not objectionable as secondary. *Commercial Bank of Penn. v. Union Bank of New York*, 1 *Kern.*, 203.
3. When the witness in a deposition testified to a note referring to it by amount, date, &c., and as described in the interrogatories, and upon

which he had written his name; and the return of the commissioners stated that "such testimony was subscribed by the witnesses, who also in the presence of the commissioners signed their names on the back of the note attached to their testimony, which notes were produced and shown to them;—*Held*, that this was all that was necessary to identify the note, and that it was admissible. *Brumskill v. James*, 1 *Kern.*, 294.

4. A direction indorsed upon a commission that the commission when executed is to be deposited in the post office, directed, &c., and a certificate thereof indorsed on the wrapper by the commissioners, does not require a certificate that it was deposited in the post-office. *Ib.*
5. Where a commission to examine witnesses abroad is returned by an agent, his affidavit, as prescribed by statute, that he received it from the hands of the commissioners, and that it has not been opened or altered since he received it, is indispensable, unless waived by consent. *Dwinelle v. Howland*, *Ante*, 87.
6. A commission returned by express, and unaccompanied by such affidavit, was excluded at circuit, although so returned pursuant to the order awarding the commission. *Ib.*
7. A deposition taken upon commission should not be rejected on the trial for the reason that the pleadings have been amended since it was taken, if the true issue between the parties remains substantially unaltered. If in such case either party wishes to examine the witness further, a motion should be made for a further commission. If the testimony is inapplicable to the new issue, a motion to suppress the deposition is proper. *Vincent v. Concklin*, 1 *E. D. Smith's C. P. R.*, 203.
8. That the attorney for a party conversed with the witnesses in a deposition, and at their request wrote down for them the substance of the facts in answer to the interrogatories, goes to the weight of the testimony, but is no reason for suppressing the deposition, in the absence of any suggestion of positive misstatement or coloring. *Commercial Bank of Penn. v. Union Bank of N. Y.*, 1 *Kern.*, 203.
9. If a party is surprised by pertinent answers to a proper interrogatory in a deposition returned, and desires to controvert or explain the facts stated, his remedy is by an application for opportunity to do so, and not by objection to the admission of the deposition. *Ib.*
10. Objections to particular parts of a deposition are no ground for excluding the whole; the parts inadmissible should be excluded, but the rest, although little should remain which could affect the merits, should be admitted. *Ib.*

EVIDENCE, *tit. Deeds and Wills*, 4.

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## DISCONTINUANCE.

1. Under the former practice the plaintiff had an absolute right to discontinue on payment of costs at any time before judgment or decree, or the submission of the cause to the jury, and this right has not been abrogated by the Code. *Seaboard & Roanoke Railroad Company v. Ward, Ante, 46.*
2. After a counter-claim has been set up and is admitted of record, plaintiff will not be allowed to discontinue as a matter of course; but special grounds must be shown, in support of an application for leave to discontinue. *Cockle v. Underwood, Ante, 1.*
3. Otherwise before the counter-claim stands admitted. *Seaboard & Roanoke Railroad Company v. Ward, Ante, 46.*
4. The plaintiff on discontinuing an action should enter an order of discontinuance. And in an action on a promissory note where defendants plead pendency of a former action on the same note, the plaintiff's reply alleging that the former suit was discontinued by service of a notice in writing on defendant, was—*Held*, bad for not averring that an order of discontinuance was entered. *Averill v. Patterson, 10 How. Pr. R., 85.*
5. A rule of discontinuance without payment of costs is good, if entered before defendant appears. *Averill v. Patterson, 10 How. Pr. R., 85.*
6. In an action on a joint contract where one defendant pleads infancy, it seems that the plaintiff may discontinue as to him, without costs, on application to the court. But if he goes to trial and the plea is established, such defendant is entitled to costs, although the plaintiff recover of the other defendant. *Cuyler v. Coats, 10 How. Pr. R., 141.*
7. The mere fact that another action has been commenced in another State after suit brought here for the same cause of action, and that it is still pending, is no reason for ordering discontinuance of the suit in this State. *The Republic of Mexico v. Arrangois, Ante, 437.* Compare *the People v. The Sheriff, &c., 1 Parker's Cr. R., 659.*

## DISCOVERY.

The New York Superior Court has the same power to compel a discovery of books, &c., by a party, as is conferred on the Supreme Court by 2 *Rev. Stats.*, 199. Where defendant refused to make the discovery required, and his answer was thereupon stricken out and judgment rendered against him,—the judgment was affirmed in the Court of Appeals. *Gould v. M'Carty, 1 Kern., 575.*

ANSWER, 15; COMPLAINT, 28.



## DISTRICT ATTORNEY.

The District Attorney has concurrent power with the Attorney General to move to set aside a stay of proceedings and quash a writ of error in a capital case. *Carnal v. The People*, 1 *Parker's Cr.*, R. 262.

## DIVORCE.

COSTS, 10; PARTIES, 19; REFERENCE, 3.

## EJECTMENT.

Section 31, in the title of Ejectment in the Revised Statutes (2 *Rev. Stats.* 308), which declares that if the title of plaintiff expires after the commencement of the suit, but before the trial, the verdict shall be returned according to the fact, and judgment entered for plaintiff for his damages, by reason of the withholding of the possession only, is one of those general provisions which apply to actions under the Code (§455). It applies to all cases where plaintiff's title from any cause ceases to exist before trial; and is not confined to cases in which the title expires by its own limitation. And it is not necessary to file a supplemental answer to enable defendant to avail himself of this provision. *Lang v. Wilbraham*, 2 *Duer*, 171.

## EVIDENCE.

[CRIMINAL LAW, *tit. Evidence*; DEPOSITION DE BENE ESSE; DEPOSITION ON COMMISSION; EXAMINATION OF ASSIGNOR; EXAMINATION OF PARTIES; LIMITATION OF ACTIONS, 2; TRIAL, *tit. Examination of Witness*, 8, 9, 10; WITNESS.]

I. *What Matters will be Judicially Noticed.*

1. Although a fact not judicially cognizable, is known to the members of the court individually, this does not dispense with the necessity of proof upon the record. *Wheeler v. Webster*, 1 *E. D. Smith's C. P. R.*, 1. Compare also *Belt's case*, 1 *Parker's Cr. R.*, 169.

II. *Burden of Proof.*

1. An agreement made by a debtor with his creditors to give them his notes, endorsed, for fifty *per cent.* of his debts, and their agreement to receive them in full discharge of the whole, is a good accord and satisfaction. But where the proof shows that such notes were to be in discharge only if paid at maturity, the burden of proof is upon the defendant, in pleading such accord and satisfaction, to show that they were so paid. *Dolsen v. Arnold*, 10 *How. Pr. R.*, 528.
2. Where the complaint charges, that a party has broken an agreement, and the answer denies that the party has broken the agree-

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ment "further or otherwise than as hereafter stated;" and acts of the plaintiff are afterwards averred in the answer, which amount to a rescission of the contract, or to a release from its performance; the burden of proof is on the defendant to show such rescission or release, and in default of his so doing, the plaintiff is not required at the trial to prove the breach. *Cotheal v. Talmadge*, 1 *E. D. Smith's C. P. R.*, 573.

3. In a suit for the statute penalty for selling spirituous liquors without a license, the burden of proof is on the defendant, to show that he had a license. *The Mayor, &c. of N. Y. v. Mason*, *Ante*, 344.
4. To establish usury in a written security, it is not sufficient to show that a part of the consideration money was intentionally withheld at the time of the execution; for the corrupt and usurious nature of the intent will not be presumed, but must be directly proved. *Booth v. Swezey*, 4 *Seld.*, 276.

### III. Presumptions.

1. Where a plaintiff, who claimed to recover for services rendered, gives his promissory note to the defendant long after the rendering of the services, and pays it when it falls due, it creates a presumption that no previous indebtedness existed on the part of the defendant to the plaintiff; but this presumption may be rebutted—*e. g.* by showing that the note was given for a temporary loan. *Duguid v. Ogilvie*, *Ante*, 145.
2. In an action for enticing away a man's wife, actual proof of the marriage is not necessary. Cohabitation, reputation, and the admission of the parties, is sufficient. *Scherpf v. Szadeczky*, *Ante*, 366.
3. And certainly the admission of the defendant, that the plaintiff and his alleged wife were married, is sufficient, without formal proof of marriage. *Ib.*
4. But on an indictment for bigamy, proof of actual marriage is necessary. *Gahagan v. The People*, 1 *Parker's Cr. R.*, 378.

### LUNATICS AND HABITUAL DRUNKARDS, 2.

### IV. Judgments and Judicial Proceedings.

1. The proper mode of proving public records of one State in the courts of another, defined. *Markoe v. Aldrich*, *Ante*, 55.
2. The admissibility and effect of a judgment recovered against a sheriff for omissions of duty by his deputy, when offered in evidence in behalf of the sheriff, in an action brought by him against the deputy and his sureties, to recover the amount. *Thomas v. Hubbell*, 18 *Barb.* 9.
3. It seems that a judgment vacating a warrant of arrest granted by a

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county judge, under the non-imprisonment act of 1831, with all proceedings under it, for want of jurisdiction in the officer granting it, is conclusive upon the question of jurisdiction, as between the parties to those proceedings, in a subsequent action for false imprisonment. *Vredenburg v. Hendricks*, 17 *Barb.*, 179.

4. When the defendant in a trespass suit raised an issue of title in respect to the portion of the close in which the technical trespass confessed was committed, and there was verdict and judgment for the plaintiff—*Held*, that the record of judgment was not evidence that the title to the entire close was adjudged to be in the plaintiff. The party seeking to make the record available as an estoppel, must show *aliunde* the portion, the title of which was in question and passed upon. *Dunkel v. Wiles*, 1 *Kern.*, 420.
5. It is purely a matter of discretion with the judge whether he will allow the pleadings to be read to the jury upon the trial. The pleadings are for the consideration of the court, and when evidence to establish the facts alleged in them is offered, it becomes necessary for the court to understand what issues are raised and which of them are properly triable. And if necessary to enable the court to understand the issues raised, counsel may be required to read the pleadings or state the substance of them. But the facts stated in them, (except so far as admitted), cannot be considered by the jury until proved, and where the pleadings contain numerous irrelevant allegations, raising immaterial issues improper to be placed before the jury for their consideration, it is very proper to prohibit them from being read. *Willis v. Forrest*, 2 *Duer*, 310.
6. An admission contained in a special plea or answer upon which issue is taken, cannot be used on the trial as a general admission of a material fact alleged in the complaint, when the whole complaint has been denied by a prior answer. *The Troy & Rutland R. R. Co. v. Kerr*, 17 *Barb.*, 581. Compare *Ayres v. Covill*, 18 *Barb.* 260.
7. After a demurrer to one of several defences contained in an answer is allowed, such defence is in effect struck from the record, and cannot be regarded on the trial as an admission of facts by the defendant. *Matthews v. Beach*, 4 *Seld.*, 173.
8. Copies of records in the office of the clerk of a board of supervisors, certified by such clerk with the seal of the office, shall be evidence like the originals. *Laws of 1855*, 383, *Ch.* 249.

*AFFIDAVIT*, 2; *JUDGMENT*, 14, 22; *TRIAL tit. New Trial*, 6, 7.

## V. Public Documents.

1. Mode of proving ordinances of the corporation of the City of New York. *Logue v. Gillick*, 1 *E. D. Smith's C. P. R.*, 398.

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2. The dishonor of a promissory note, payable at a place within a foreign State, cannot be proved by the certificate of a notary. It is only in relation to foreign bills of exchange that the protest of a foreign notary can be admitted in evidence, and a note is not rendered a bill of exchange by being made payable in a foreign place. The provisions of our own statute apply only to protests made within this State, and by our own notaries. And even a statute of the State within which the note is made payable, declaring the notary's certificate of protest legal evidence, does not justify its admission in the courts of this State. There is no case in which a foreign law can be permitted to control and supersede our own rules of evidence. *Kirtland v. Wanzer*, 2 *Duer*, 278.

#### *VI. Private Writings.*

1. The rules which govern the admission of plaintiff's entries in his own private books of account as evidence in his favor. *Foster v. Coleman*, 1 *E. D. Smith, C. P. R.*, 85.
2. In an action upon a promissory note against the indorser, a notary's Clerk testified—that he had himself presented the note for payment, and mailed a notice of non-payment to the defendant—that he knew this from an examination of his books and papers—that he was in the daily habit of protesting notes—that it was his usual practice to make the entries in the memorandum book the same day that he delivered the notices of non-payment—that he had no recollection of making the entries in this case, but knew they would not have been made if he had not done the acts—and he produced the memorandum book, the entries from which were read to the jury. *Held* sufficient evidence of notice of protest. *Cole v. Jessup*, 10 *How. Pr. R.*, 515.

#### *VII. Deeds and Wills.*

1. As to the evidence necessary to prove sealed instruments. *Merritt v. Cornell*, 1 *E. D. Smith's C. P. R.*, 335.
2. What is sufficient proof of the due execution of a will? *Cheaney v. Arnold*, 18 *Barb.* 434; *Mead v. Mead*, *Ib.*, 578; *Waterman v. Whitney*, 1 *Kern.*, 157; *Lewis v. Lewis*, *Ib.*, 220.
3. The rule that the execution of an instrument must be proved by the subscribing witness, if there be one living competent to testify, and within the jurisdiction of the court, is inflexible. The adverse party has an undeniable right to require him who offers the instrument in evidence to call the person who was chosen to attest the fact of execution, that he may by cross examination elicit all the attending circumstances. The oath of the party who executed the instrument cannot be substituted. (6 *Hill*, 303; 2 *Wend.* 575; 2 *Greenl. Ev.* § 569.) *Story v. Lovett*, 1 *E. D. Smith's C. P. R.*, 153.

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4. Where the execution of a witnessed contract had been proved without objection by secondary evidence, in taking evidence conditionally, it cannot be objected to on that ground at the trial. *Ward v. Whitney*, 4 *Seld.* 442.

## VIII. Estoppel.

1. What will constitute an estoppel *in pais*? *Carpenter v. Stillwell*, 1 *Kern.*, 61.
2. Recitals in a deed are evidence of the facts recited as between the parties to the deed and those deriving title under them. Those who claim under the deed are as much bound as the original party through whom they claim. *Demeyer v. Legg*, 18 *Barb.*, 14. And see *McBurney v. Cutler*, 18 *Barb.*, 203.

*Tit. IV. Judgments and Judicial Proceedings*, 4; *JUDGMENTS*, 8; *JUSTICES' COURT, tit. Jurisdiction*, 2.

## IX. Hearsay.

1. In a libel suit the terms and conditions on which the defendant requested and directed the publication to be made are admissible in evidence on his behalf, as part of the *res gestæ* showing his motives. Where such evidence was excluded on the trial and the defendant excepted, though afterwards plaintiff proved by other testimony the publication of the same libel at another time, the defendant is not thereby precluded from the benefit of his exception. *Taylor v. Church*, 4 *Seld.*, 452.
2. Admissions of a party holding written securities for a debt made while he is owner of them are not necessarily evidence, as a part of *res gestæ* against his assignee, but under some circumstances may be excluded as hearsay. *Booth v. Swezey*, 4 *Seld.*, 276.

## X. Lost Instruments.

1. The rule which permits secondary evidence of the contents of a lost deed to be given, requires clear proof of the *contents* of the deed, and such as leaves no reasonable doubt. Proof of the negotiations which led to the giving of the deed, or of what was agreed to be conveyed, is inadmissible. *McBurney v. Cutler*, 18 *Barb.*, 203.
2. A check is a bill of exchange within the statute, authorizing a recovery upon a lost bill of exchange when the bond of indemnity required by the statute is tendered to the defendant upon the trial, and parol proof of the contents of the instrument given. *Jacks v. Darrin*, *Ante*, 148.
3. The provision of the Revised Statutes requiring indemnity to be given in order to entitle to a recovery on a lost note or bill of exchange, (2 *Rev. Stat.*, 406,) amended, so as not to apply to any

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action in which the people of the State are a party. *Laws of 1855, 123, Ch. 85.*

### XI. Notice to Produce Papers.

A copy of a letter addressed by the plaintiff to the defendant, demanding payment of the money for which the action is brought, should not be received in evidence to prove the demand, except on proof of notice to the defendant to produce the original. *Weeks v. Lyon, 18 Barb., 530.*

### XII. Parol Proof to Explain or Vary.

1. Parol evidence is admissible to prove that a deed absolute in terms was intended as a mortgage. (*Per JOHNSON, J., RUGGLES, Ch. J., and GARDINER, JEWETT, and MORSE, J. J.; Contra, WILLARD, TAGGART, and MASON, J. J.*) *Hodges v. The Tennessee Marine and Fire insurance Co., 4 Seld., 416.*
2. Parol evidence is not admissible to show that a receipt of a sum in full of damages was given upon a condition not expressed in it, for the purpose of getting rid of the effect of the receipt. (*Eggleston v. Knickerbocker, 6 Barb., 458; and White v. Parker, 8 Barb., 48, compared and explained; Coon v. Knap, 4 Seld., 402.*
3. Correspondence between the parties to an agreement bearing date prior to the agreement, is inadmissible (the date being unimpeached) in explanation of the written contract. *Coons v. Chambers, Ante, 165.*
4. The meaning of letters and abbreviations used in a written contract may be proved by parol. *Dana v. Fiedler, 1 E. D. Smith's C. P. R., 463.*
5. It is a familiar rule that parol proof of extrinsic circumstances may be given to apply a description to its subject matter; and that if it appears that the description is in some parts erroneous, those parts may be rejected, and what is left, if sufficient of itself, alone be regarded. (*21 Wend., 651; 9 Barb., 630; 1 Wend., 541; 19 Johnson, 448; 7 Johnson, 218; 1 Greenl. Ev., §§ 285-288; 9 How. Pr. R., 479; 4 Metc. 80; 12 Pick., 557*). This rule applied to descriptions of an indebtedness and of mortgaged property contained in a chattel mortgage. *Dodge v. Potter, 18 Barb., 193.*
6. It seems, that as between the original parties to a bill of lading it is competent to the plaintiff to show that the shipper named in the bill was, in fact, the agent of the plaintiff, although not so described in the bill, and that the goods were shipped on the plaintiff's account. Such evidence neither contradicts, varies, nor explains the writing; it merely goes beyond it to establish a new and independent fact. (*7 Ad. & E., 29.*) *Ide v. Sadler, 18 Barb., 32.*
7. Where in a deed to trustees for religious purposes the use is ex-

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pressed in general terms, it cannot be inferred that it was intended to limit the use to the support of the particular faith which the donor professed; though, if the language of the trust be ambiguous, perhaps the faith of the donor may be received in evidence to aid in its construction. *Robertson v. Bullions*, 1 *Kern.*, 248.

8. Several instruments though of the same date and subject matter, cannot be construed together as one contract, unless they are between the same parties. *Craig v. Wells*, 1 *Kern.*, 315.

### XIII. Admissions.

1. The admissions and confessions of parties are admissible in evidence when pertinent to the issue. They are not by any means conclusive, and not necessarily even *prima facie* evidence. They may be controlled and overborne by other evidence; but when they relate to matters material to the issue, they should be received, and the effect to be given to them rests wholly with the jury. If it appears that the party had no personal knowledge of the facts admitted, but little importance is to be attached to the admission, and the jury should be so instructed. *Stephens v. Vronan*, 18 *Burb.*, 250.
2. Where plaintiff proves an admission of defendant, defendant may inquire further in regard to it, and prove all that was said on the subject at the same time. *Houghtaling v. Kelderhouse*, 1 *Parker's Cr. R.*, 241.
3. Where the liability of defendant is sought to be proved by inference from circumstances and from his verbal declarations and admissions, he is entitled to demand that all the circumstances and all his conversations relating to the subject matter should be taken into consideration. *Nesbit v. Stringer*, 2 *Duer*, 26.
4. Where defendant had rendered an account to which the plaintiffs made no objection at the time, but drew on him for the precise balance,—*Held*, that this was conclusive evidence that the items were agreed to, and that the account was an account stated. *Lockwood v. Thorne*, 1 *Kern.*, 170.
5. An admission by one of two plaintiffs, embodied in his agreement with a third party, to the effect that the note now in suit was void,—*Held* admissible in favor of the present defendant. *Pringle v. Chambers*, *Ante*, 58.

*Tit. III, Presumptions*, 3, 4; *tit. IV., Judgments and Judicial Proceedings*, 6; *tit. IX., Hearsay*, 2.

### XIV. Opinions and Belief of Witnesses.

1. The opinions of witnesses not examined as *experts*, held inadmissible. *Dunlap v. Snyder*, 17 *Burb.*, 561; *Brown v. The Mohawk & Hud-*

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- son Rail Road Company, 1 *How. App. Cas.*, 52; Lee *a. Bennett*, *How. App. Cas.*, 187; Duff *a. Lyon*, 1 *E. D. Smith's C. P. R.*, 586; Parsons *a. Disbrow*, *Ib.* 547; Woodin *a. The People*, 1 *Parker's Cr. R.*, 464; Holmes *a. Anderson*, 18 *Borb.*, 420; Simmons *a. Fay*, 1 *E. D. Smith's C. P. R.*, 107; but see Harper *a. Leal*, 10 *How. Pr. R.*, 276.
2. The opinions of witnesses not examined as *experts* may be admissible from the necessity of the case. Rochester & Syracuse R. R. Co. *a. Budlong*, 10 *How. Pr. R.*, 289.
  3. The rule that opinions may be received on questions of value but not on questions of damages, explained. *Ib.*
  4. The opinion of a qualified witness upon the future value of lands, or their probable diminution in value in a supposed state of facts, held admissible. *Ib.*
  5. The opinion of a physician examined as an *expert*, may be asked upon an hypothetical state of facts. Lake *a. The People*, 1 *Parker's Cr. R.*, 495.
  6. The opinion of a physician examined as an *expert* must be based on all the testimony relating to the matter; and if he has only heard a part, his opinion is inadmissible. Lake *a. The People*, 1 *Parker's Cr. R.*, 495.
  7. The admissibility of the opinions of witnesses as to the value of property which they have not seen, considered. Harper *a. Leal*, 10 *How. Pr. R.*, 276.

## XV. In Certain Actions.

1. Pleadings, evidence and measure of damages, in actions of trespass. Levy *a. Bend*, 1 *E. D. Smith's C. P. R.*, 169; Ives *a. Humphreys*, *Ib.*, 196.
2. As to rules of evidence in cases of claims for the return of fugitives from service. Belt's Case, 1 *Parker's Cr. R.*, 169.
3. In an action upon a covenant, under an averment of performance, evidence in excuse of non-performance is not admissible. Oakley *a. Morton*, 1 *Kern.*, 25.
4. In an action of assault and battery, provocations of long standing at the time of the assault cannot be proved in mitigation. Willis *a. Forrest*, 2 *Duer*, 310.
5. In an action to recover the value of a trunk and contents lost on the defendants' rail road,—held, that the fact that the plaintiff was a passenger, and that the defendants took his baggage, was sufficiently proved by his possession of the baggage check and the testimony of the baggage-master to the custom of giving checks. Davis *a. The Cayuga & Susquehanna R. R. Co.*, 10 *How. Pr. R.*, 330.



6. Evidence of general reputation for negligence inadmissible to prove negligence upon a particular occasion. *Jacobs v. Duke*, 1 *E. D. Smith's C. P. R.*, 271.
7. In an action for damages for injuries to the person, evidence of the plaintiff's complainings of distress and pain is admissible. *Caldwell v. Murphy*, 1 *Kern.*, 416.
8. In an action for damages for injuries to the person, evidence of the nature of the plaintiff's trade, that he had no other means of support, except the charity of friends, of the number of persons in his family, and in what manner they were supported after the injury, is admissible to show that the plaintiff's circumstances were such that he would probably have been in employment but for his injuries. *Caldwell v. Murphy*, 1 *Kern.*, 416.
9. Whether in an action for slander evidence in mitigation is admissible under a plea of justification; *Query?* *Bush v. Prosser*, 1 *Kern.*, 347.
10. In an action against the proprietor of a newspaper for libel, an article published in his newspaper, if sufficiently connected with the defendant by proof, may be read in evidence to show the circulation of the paper, and the proprietor's income from it. *Fry v. Bennett*, *Ante*, 289.
11. In a suit for malicious prosecution, the plaintiff must prove the entire want of probable cause for the accusation, and actual malice on the part of the defendant, in preferring it. Whether there was actual malice is a question of fact which must be decided by the jury. But whether there was probable cause is in all cases a question of law which the court alone is competent to determine, and upon which it is bound to express a positive opinion. It is no more a mixed question of law and fact than any other question of law which a judge can be required to determine in the progress of a trial. If, therefore, the facts are admitted or clearly established, and the judge is of opinion that they do not prove a want of probable cause, he must either non-suit the plaintiff or instruct the jury to find for the defendant. But if the facts are doubtful, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not, as the case may be, amount to a want of probable cause. It is error to submit the question of probable cause to the jury even by implication. *Bulkeley v. Smith*, 2 *Duer*, 261.
12. An action for seduction can be sustained, although it be not shown that the minor daughter was actually in her father's service, or that he incurred any trouble or expense in her sickness; it is sufficient if he was legally entitled to her services. *Mulvehall v. Millward*, 1 *Kern.*, 343.

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*Tit. II. Burden of Proof. Tit. III. Presumption, 2, 3, 4. Tit. IX, Hearsay. ANSWER, 32. WITNESS tit. Competency, 10.*

## EXAMINATION OF ASSIGNOR.

1. There is no reason for restricting the provision of the Code allowing a party to be examined in his own behalf, when the assignor of a *chose in action* has been examined by the adverse party, to the case of the examination of a voluntary assignor. It applies also where the assignment is made in pursuance of law or the direction of a court or officer. *Gardner v. Clark, 17 Barb., 538.*
2. A person who sells a promissory note, *whether by indorsement or not*, is an assignor of a thing in action, within the meaning of section 399 of the Code. *Potter v. Bushnell, 10 How. Pr. R. 94.*
3. One who transfers a promissory note by delivery *and without indorsement*, is not an assignor of a thing in action, within the meaning of section 399 of the Code. And when in an action upon the note he has been examined on behalf of the plaintiff, this does not entitle the adverse party to offer himself as a witness. *Watson, v. Bailey, 2 Duer, 509.*
4. So of the *indorser of a promissory note.* *Hicks v. Wirth, 10 How. Pr. R., 555.*
5. The fact that an assignor of a *chose in action* has covenanted with the assignee that the full amount of the claim was due, does not render him incompetent to prove the claim in a suit by the assignee. *Winthrop v. Meyer, Ante, 383. Compare Van Wyck v. McIntosh, 2 Duer, 86.*
6. It is only necessary to give notice of the intended examination of an assignor of a chose in action, when he is to be examined against an assignee, executor, or administrator. *Collins v. Knapp, 18 Barb., 532; Farley v. Flanagan, 1 E. D. Smith, C. P. R., 313.*
7. The provision of the Code, requiring ten days' notice of the intended examination of an assignor of a chose in action is applicable to justices' courts. It constitutes a rule of evidence within the meaning of section 64, subd. 15. *Collins v. Knapp, 18 Barb., 532; Pelham v. Bryant, 10 Pow. Pr. R. 60.*
8. Where a defendant is entitled to offer himself as a witness in reply to the testimony of an assignor, examined by the adverse party, his examination is not limited to the identical points as to which the assignor was examined, but he may testify as to the same matter. *Gardner v. Clark, 17 Barb., 538. See also Ward v. Ingraham, 1 E. D. Smith's C. P. R., 538.*

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9. The testimony of the assignees of a chose in action, to be received with caution. *Watkins v. Cousall*, 1 *E. D. Smith's C. P. R.*, 65.

ASSIGNMENT, 9.

## EXAMINATION OF PARTIES.

1. In all actions a defendant is a competent witness for his co-defendant; but as to the subject matter of his examination, he is restricted to answering questions tending to establish a defence of which the co-defendant may avail himself separately. What matters are such,—considered. *Beal v. Finch*, 1 *Kern.*, 128. *Lefever v. Brigham*, 10 *How. Pr. R.*, 385.
2. Where a plaintiff calls the defendant as a witness, to prove the plaintiff's claim, and the defendant, on a cross-examination in his own behalf, proves a counter-claim, as set up in his answer, the plaintiff may be examined in reference to the evidence given by the defendant, on the subject of the counter-claim. *Harpell v. Irwin*, *Ante*, 144.
3. Where a defendant, sued upon an agreement, was examined on behalf of the plaintiff to prove the alleged breach; and afterwards, upon his cross-examination, he stated the reason why he had not performed the alleged agreement,—*Held*, that this was not such new matter as authorized the plaintiff to offer himself as a witness, under section 395 of the Code. *Chamberlain v. Hamlington*, 18 *Barb.*, 324.

DEPOSITION ON COMMISSION, 1; EXAMINATION OF ASSIGNOR, 1, 3, 4, 8; WITNESS *tit.*, *Contradiction and Impeachment*, 6.

## EXCEPTIONS, BILL OF.

1. When a charge given by the court, on the trial of a cause, contains several distinct propositions, and exception is taken to the charge generally, if *either* proposition be sound and correct, the exception will be unavailable. *Hart v. The Rensselaer & Saratoga R. R. Co.* 4 *Seld.*, 37; *Acker v. Ledyard*, *Ib.* 62; *Caldwell v. Murphy*, 1 *Kern.*, 416.
2. Where the defendant requested the judge, after his charge to the jury, to give them further a certain instruction, which the judge refused to do; to which refusal, and to the whole charge, as made, the defendant excepted—*Held*, that the exception to the refusal was sufficiently pointed; but the exception to the whole of the charge as made was entirely too general, and must be disregarded. *Booth v. Swezey*, 4 *Seld.*, 276.
3. A general exception "to each and every part of the charge," must be disregarded. *Caldwell v. Murphy*, 1 *Kern.*, 416.

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4. But where the bill of exceptions shows expressly that each of the offers and requests was separately made and ruled upon, and that each of these decisions was severally excepted to it, is sufficient. *Dunkel v. Wiles*, 1 *Kern*. 420.
  5. The refusal of a judge to receive testimony after the case is closed, in the exercise of his judicial discretion, not reviewable upon a bill of exceptions. *Chancel v. Barclay*, 1 *E. D. Smith's C. P. R.*, 384.
  6. Whether counsel shall be permitted to address the jury, is a matter resting in the sound discretion of the court; and if a judge at the trial errs in the exercise of this discretion, the remedy is by motion for a new trial on a case, and not by bill of exceptions. *The People v. Cook*, 4 *Seld.*, 67.
  7. The privilege to make a case, with leave to turn it into a bill of exceptions, should be applied for at the trial. Even then it should only be granted as a matter of favor, and upon good reason. A motion for such leave, made after the trial, should only be granted under very special circumstances. *Hammond v. Hazard*, 1 *E. D. Smith's C. P. R.*, 314.
  8. What should the bill of exceptions contain? Exceptions contained in a case should be separated from it, in order to present the questions of law to the court, on appeal. Where the return shows that the exceptions were taken at the trial, and separately stated, it is not necessary that they should be authenticated by the court below. If they do not appear, from the return, to have been separately stated in the first instance, or to have been separated from the case made under direction of the court below, the Court of Appeals have power to dismiss the appeal. *Zabriskie v. Smith*, 1 *Kern.*, 480.
  9. To prevent a failure of justice, the court will order a bill of exceptions, when a case containing the exceptions has been properly settled, to be signed by the clerk, in the name of a deceased judge who tried the cause. *Milvehal v. Milward*, 2 *Duer*, 607.
- CRIMINAL LAW, *tit. Writ of Error*, 2, 4; EVIDENCE, *tit. Hearsay*. 1.

## EXECUTION.

1. Judgment was recovered in a court of common pleas, now county court, but execution issued by mistake out of the Supreme Court, which was afterwards amended by the county court.—*Held*, that the execution, notwithstanding the attempted amendment, was void. Judgments must be executed in the courts in which they are rendered, and the Supreme Court could not assume to execute this judgment of another court. The power incidental to every court to

amend its own process, does not authorize it to amend the process issued from another court. Void process cannot be amended, for the reason that there is nothing to amend by. The writ issuing out of the Supreme Court, and returnable in that court, there is nothing in the county court to amend by. The county court could not amend anything that had been done in that court towards the execution of that judgment—for nothing had been done in that court. *Clarke v. Miller*, 18 *Barb.*, 269.

2. Where, by reference to the judgment, it appears to have been rendered in an action wherein the party was liable to imprisonment, a party will not be discharged from arrest upon an execution against the person for the reason that the nature of the action does not appear upon the face of the execution. *Fullerton v. Fitzgerald*, 18 *Barb.*, 441. S. C. 10 *How. Pr. R.*, 37.
3. Where an execution issued against two joint debtors has been levied upon the property of one of them, the plaintiff will not be allowed to countermand it, and issue a new execution for the purpose of making a levy upon the sole property of the other defendant, especially if it appears that the first execution was withdrawn at the request of the debtor upon whose property it was levied, and with the express purpose of screening him from the payment of any part of the debt, and collecting the whole from the property of his co-defendant. *McChain v. Duffy*, 2 *Duer*, 645.
4. The act of 1842, ch. 157, exempting certain property of a debtor from execution, applies equally to the case of a debt incurred before its passage as subsequently. *Morse v. Goold*, 1 *Kern.*, 281.
5. H. gave a note containing the following clause: "and for the payment of the same (the amount) I agree to and with them to waive all exemptions to property"—*Held*, that such a clause did not estop her from bringing an action for the taking of exempt property under an execution issued upon a judgment recovered on the note. Such a clause is totally void as in contravention of the spirit of our statutes and of public policy. *Harper v. Leal*, 10 *How. Pr. R.*, 276.
6. What evidence is sufficient to show an execution fraudulent or dormant. *Paton v. Westervelt*, 2 *Duer*, 362.
7. Execution against executors for the full amount of the judgment against the estate of the deceased, when the executor's account having been rendered and settled, there were not sufficient assets to pay all claims—*Held*, irregular. It should have been for a just proportion of the amount of the assets. Plaintiff in this case had liberty to amend on payment of costs of the motion to strike out. *Olmstead v. Vredenburg*, 10 *How. Pr. R.*, 215.

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8. Execution cannot issue upon a judgment after the death of the judgment creditor. The remedy of the executor is properly to be sought by original action. *Thurston v. King*, *Ante*, 126; *Jay v. Martine*, 2 *Duer*, 654.

ATTACHMENT, 2; COMPLAINT, 5; JUSTICES' COURT, *tit. Execution*; SHERIFF, 3, 4; STAY OF PROCEEDINGS, 4.

### EXECUTORS AND ADMINISTRATORS.

The only effect of omitting to present to an executor or an administrator a claim against his testator within the six months prescribed by 2 Rev. Stats., 88, § 84, is, to limit the recovery in a subsequent suit upon the claim to the amount of assets in the hands of the administrator or executor at the commencement of the suit; and to deprive the creditor of the right to costs. The right of action is not barred where the claim was not presented at all, but only where it was presented and disputed or rejected, and was neither referred nor prosecuted within six months afterwards. *Baggott v. Boulger*, 2 *Duer*, 160.

AMENDMENT, 11; ASSIGNMENT, 10; COMPLAINT, 27; EXAMINATION OF ASSIGNOR, 6; EXECUTION, 7, 8; JOINDER OF ACTIONS, 6; MOTIONS AND ORDERS, 4; PARTIES, 12, 13, 14, 15.

### FRIVOLOUS ANSWER.

ANSWER, 7, 8, 9, 10, 11; MOTIONS AND ORDERS, 10.

### GENERAL AND SPECIAL TERM.

AMENDMENT, 10; APPEAL, 13, 17; COURT; IMPRISONMENT; JUDGMENT, 2; MOTIONS AND ORDERS, 1, 2, 4, 6, 7.

### GUARDIAN AD LITEM.

1. As to the mode of executing a deed by a guardian *ad litem* on behalf of a minor pursuant to order of court. *Hyatt v. Seeley*, 1 *Kern.*, 52.
2. The requisites of an appointment of a guardian *ad litem* for minors parties to a partition suit, considered. *Varian v. Stevens*, 2 *Duer*, 635.

PARTIES, 20.

### HABEAS CORPUS.

1. How far the officer granting habeas-corpus is concluded by the return, and in what cases he may look behind it. *People v. Martin*, 1 *Parker's Cr. R.*, 187; *People v. Tompkins*, *Ib.*, 224.
2. Proceedings prior to a commitment for vagrancy cannot be reviewed on *habeas corpus*, if that commitment is regular, and the record of conviction is properly made and filed. *Stewart's case*, *Ante*, 210.

3. Where the record of conviction should be filed. *Ib.*
4. That a judgment of conviction does not designate the particular offence of which the prisoner was convicted—and that the prisoner convicted in King's County has been sentenced to imprisonment exceeding thirty days in the county jail instead of in the penitentiary as required by statute (*Laws of 1853, ch. 110, § 2*)—are errors upon which the prisoner is entitled to his discharge upon *habeas corpus*.\* Cavanagh's case, 10 *How. Pr. R.*, 27. S. C. 1 *Parker's Cr. R.*, 588.
5. The principle of *res adjudicata* applies to proceedings upon *habeas corpus*. The decision of an officer empowered to issue and decide upon a writ of *habeas corpus*, is conclusive upon any subsequent writ where the subject matter and the parties are the same. And the parties are the same where relief is sought in behalf of the same person against the same respondent. That the relators are different, does not alter the case. *Da Costa's Case*, 1 *Parker's Cr. R.*, 129.
6. Forms of *habeas corpus* and of returns thereto. *People v. Tompkins, Ib.*, 224.

## JURISDICTION, 8.

## HUSBAND AND WIFE.

EVIDENCE, *tit. Presumptions*, 2, 3, 4; JOINT LIABILITY, 1; MARRIED WOMEN; PARTIES, 19; WITNESS, *tit. Competency*, 9.

## IMPRISONMENT.

A petition for the discharge of a debtor imprisoned upon execution must be first presented to the court at a regular special term. It cannot be heard at chambers, nor in the first instance at general term. *Walker's Case*, 2 *Duer.*, 655.

ARREST, 2, 4, 5; COMPLAINT, 5; EXECUTION, 2; NON-IMPRISONMENT ACT.

## INFANT.

DISCONTINUANCE, 6; GUARDIAN AD LITEM PARTIES, 20.

## INJUNCTION.

1. Where an action was brought on behalf of one firm out of a large number of creditors of an insolvent firm, and was brought not only against the general partners of the firm, but also against a special partner who denied his indebtedness;—*Held*, that an application for

\* This decision is said to have been since reversed by the general term.

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- an injunction and the appointment of a receiver must be denied. *La Chaise v. Lord*, *Ante*, 213.
2. To warrant the granting of such an application ;—It should be made in behalf of all the creditors of the insolvent firm who will unite therein ;—And all the defendants sought to be made liable as partners should admit the indebtedness. *Ib.*
  3. As a general rule an injunction will not be allowed upon mere information and belief. (7 *Paige*, 157 ; 9 *Ib.*, 305 ; 1 *Barb.*, *Ch. Pr.*, 617.) *Woodruff v. Fisher*, 17 *Barb.*, 224.
  4. If the grounds for an injunction were existing at the commencement of the suit, and are fully set out in the complaint under positive allegations, and if the complaint contains a prayer for injunction, the complaint itself, if duly verified, without a separate affidavit, is sufficient to support an application for an injunction. But if the cause for the injunction arises during the litigation, then, as a general rule, there must be an affidavit. *Ib.*
  5. An *ex parte* injunction should be dissolved if on a hearing of both sides fraud is denied, and it does not appear that the continuance of the injunction is necessary to the rights of the one party, while it is certain to be prejudicial to those of the other. *M'Cafferty v. Glazier*, 10 *How. Pr. R.*, 475.
  6. An injunction cannot be granted to prevent a consequential injury necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State or authorized by competent municipal authority. *Williams v. The New York Central Railroad Company*, 18 *Barb.*, 222.
  7. Injunction should not be issued unless the thing sought to be prohibited is in itself a nuisance. If the thing to be enjoined is not in itself noxious and the risk of the anticipated injury is not imminent, the court may refuse to interfere until the matter has been tried at law. *Phoenix v. The Commissioners of Emigration*, *Ante*, 466.
  9. A stronger case must be made out where the ground of the injunction is anticipated depreciation in the value of the neighboring property, than where it is injury to the health of the neighborhood. *Ib.*
  8. An immigrant depot is not a known nuisance in the law, and will not be enjoined as such. *Ib.*
  10. An injunction will issue to restrain the State, or a municipal corporation, from maintaining a nuisance on their lands. *Ib.*
  11. An injunction will not be granted to restrain commissioners of excise from granting licenses to sell intoxicating liquors where no excess of authority or actual corruption is shown. *Leigh v. Westervelt*, 2 *Duer*, 618.



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12. An injunction to restrain the collection of a tax illegally imposed, will not be granted. *Wilson v. The Mayor, &c., Ante*, 4; *The Chemical Bank v. The Mayor, &c., Ante*, 79; *The New York Life Ins. Co. v. The Board of Supervisors, &c., Ante*, 250.
- CONTEMPT, 5, 7; CORPORATION, 7; COURT, 3; JUDGMENT, 21, 23; MORTGAGE, 3; MOTIONS AND ORDERS, 8; REPLEVIN, 2.

## INNKEEPER.

1. Money in a trunk, not exceeding the amount reasonably required by the traveler to defray the expenses of the journey which he has undertaken, is a part of his baggage; and in case of its loss, the plaintiff may prove its amount by his own testimony. *Taylor v. Monnot, Ante*, 325; but see *Grant v. Newton*, 1 *Smith's C. P. R.*, 95.
2. So of the tools used by plaintiff in his trade as a harness maker, and carried in his trunk; and so of a gun. *Davis v. The Cayuga & Susquehanna R. R. Co.*, 10 *How. Pr. R.*, 330.
3. *It seems*, that the liability of an innkeeper for the baggage of his guest, is not confined to personal baggage, but extends to all the property, which as the property of his guest, the innkeeper consents to receive. *Taylor v. Monnot, Ante*, 325.
4. But see act qualifying the liability of innkeepers for "money, jewels, or ornaments." *Laws of 1855*, 774, *ch.* 421.

WITNESS, *tit. Competency*, 10.

## INTERPLEADER.

1. An order of interpleader, under section 122 of the Code, can only be made when it is certain that the only question is whether the plaintiff or a third person is the true owner of the debt, fund, or other property for which judgment is demanded; and when it is insisted that the defendant is absolutely liable, and is precluded from setting up the title of a third person as a defence, his application to be discharged from the suit must be denied. *Sherman v. Partridge, Ante*, 256; and see *Chamberlain v. O'Connor*, 1 *E. D. Smith's C. P. R.*, 665.
2. It is only in an action against the defendant himself that the question of his absolute liability can be properly raised and determined. A judge would exceed the just limits of his authority by so deciding the question upon a motion, as to put an end to the action, and bar an appeal. *Sherman v. Partridge, Ante*, 256.
3. In an action for the recovery of a debt arising from the sale of goods, the purchaser cannot require his vendor to interplead with a third person claiming to be the owner of the goods. This is not a case in which an interpleader has ever been allowed, nor is it embraced within the terms of the Code. *Ib.*

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4. Where there is a contest between two adverse claimants of moneys collected by a sheriff upon execution, the court out of which the execution issued, may very properly make an order for the payment of the money into court; and when the sheriff has complied with the order, he has done his whole duty, and the order is a protection to him in a suit afterwards brought against him by one of the claimants, for the money. *Acker v. Ledyard*, 4 *Seld.*, 62.

Costs, 7.

## JOINT LIABILITY.

1. Sections 136 and 274 of the Code, providing for judgments against one or more of several defendants, were intended to remedy the inconvenience of the common law rule, that upon a joint contract, recovery must be against all the defendants or neither. In an action upon a promissory note made in a firm name, it appearing on the trial that the alleged partners were husband and wife, a judgment against the husband is proper. (But *SELDEN J.* dissented.) *Brumskill v. James*, 1 *Kern.*, 294.
2. The proceedings authorized by the Code to be taken in suits brought against defendants jointly liable upon contract, may be taken in a suit brought upon a judgment rendered against defendants jointly, upon a contract upon which they were jointly liable. *Mahaney v. Penman*, *Ante*, 34. And see *Wanzer v. De Baun*, 1 *E. D. Smith's C. P. R.*, 261.
3. Where several defendants are sued on a joint liability, there can only be a joint recovery and judgment; and no judgment can be entered by plaintiff, until all the defendants served have had the full time to answer. *Jacques v. Greenwood*, *Ante*, 230.

APPEAL, 15; COMPLAINT, 28; EXECUTION, 8; LIMITATION OF ACTIONS, 4; PARTIES, 12, 13, 14, 15, 16.

## JOINDER OF ACTIONS.

1. It is essential to a good complaint, containing several causes of action, that they should all belong to one of the classes mentioned in 167 of the Code, and that they should be separately stated. *Landau v. Levy*, *Ante*, 376.
2. Judgment against the defendant personally, and as trustee, cannot be sought in the same action. *Ib.*
3. Allegations of conversion and detention of personal property and prayer for its specific delivery and for damages, *held* good, as setting forth only a single cause of action, and demanding only one kind of remedy. *Vogel v. Badcock*, *Ante*, 176.

4. A complaint demanded judgment as follows: 1. For a balance due on a building contract between plaintiffs and defendant. 2. For a sum for extra work and materials. 3. For damages sustained by plaintiffs in consequence of being delayed by defendant in the completion of the work. 4. That an award made by an arbitrator mutually chosen, in relation to certain disputes growing out of the contract, should be set aside as obtained by fraud or undue influence; *Held*, that as equitable and legal relief may be sought in the same action, and all the causes of action set forth in the complaint grew out of the same transaction, they were properly united. See *a. Partridge*, 2 *Duer*, 463.
5. A creditor of a partnership, whose debt is admitted, may, in case of conceded insolvency, proceed in the same suit to establish his claim and to set aside as fraudulent an assignment by the debtors of their property for the benefit of their creditors. *Mott a. Dunn*, 10 *How. Pr. R.*, 225. But see *Neustead a. Joel*, 2 *Duer*, 530. Compare *Bishop a. Houghton*, 1 *E. D. Smith's C. P. R.*, 566.
6. Demands for rent which accrued in the life time of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly joined as one cause of action in a suit against the executors as such. *Pugsley a. Aikin*, 1 *Kern.*, 494.
7. The following causes may be joined in an action against a constable and his sureties:
  1. That the constable took sufficient goods on the plaintiff's execution to satisfy it.
  2. That he neglected to make return.
  3. That he withheld the money after the return day. But these are separate causes of action, and should be separately stated. *Moore a. Smith*, 10 *How. Pr. R.*, 361.
8. The causes of action formerly known as trespass and ejectment, and trespass, *quare clausum fregit*, as to the same premises, cannot be united in the same complaint, for the reason that to entitle the plaintiff to recover for the trespass he must show himself to have been in possession when the tortious acts were committed, and that he had regained the possession at the time of the commencement of the action; while to entitle him to maintain his action for the ouster, and to recover the possession, he must show that the defendant had possession when the action was instituted. When these claims are united the plaintiff may properly be required upon the trial to elect upon which of them he will proceed. *Budd a. Bingham*, 18 *Barb.*, 494.

DEMURRER, 8.

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## JUDGMENT.

1. Judgment upon appeal cannot be rendered as of a day subsequent to the death of a party appellant or respondent. But it may be rendered as of a day prior to his decease. Except that a day cannot be selected for this purpose, upon which the court of appeal could not have been in session, or the appeal could not have been heard. *De Agreda v. Mantel, Ante, 130.*
2. The proper form of judgment of affirmance upon appeal from the special to the general term, defined. *Ib.*
3. The test of the right to docket a judgment is the right to issue execution upon it immediately. *Ib.*
4. Where a joint answer of two defendants was served after the time for answering by one of them had expired, and the plaintiff's attorney returned it, waited until the time of the other defendant had also expired, and then entered judgment:—*Held*, that the judgment was regular. *Jacques v. Greenwood, Ante, 230.*
5. In an action for the recovery of a debt fraudulently contracted, the judgment record must show the fraud in order to hold the body of the defendant on execution. *Harris v. Cone, 10 How. Pr. R., 259*; and see *Fullerton v. Fitzgerald, 18 Barb., 441*; *S. C., 10 How. Pr. R., 37.*
6. The proper practice in respect to the form of entering judgment in the court below upon remittitur from the Court of Appeals, defined. *The Union India Rubber Company v. Babcock, Ante, 262.*
7. In an action on a contract for the payment of money only, where the complaint is not verified and the defendant has appeared, he is entitled to notice of assessment on entry of judgment; and entry of judgment without such notice is irregular. *Cook v. Pomeroy, 10 How. Pr. R., 103.*
8. Where a second record of judgment in the course of a suit was, by mistake, made up and filed, and execution issued thereupon in good faith upon the supposition that the second judgment was, in fact, for a different demand from the first, and the defendant contrived to procure satisfaction of the judgment first entered, and then moved to vacate the second for irregularity:—*Held*, that he was, under the circumstances, estopped by procuring the first judgment to be satisfied, from objecting to the regularity of the second. *Weed v. Pendleton, Ante, 51.*
9. A partner has no authority to confess judgment on behalf of the firm contrary to the wish of the copartner; and judgment entered against both upon an accepted offer of one to let judgment be taken against

- him, is irregular, and will not be allowed to stand as against the other even as security, where it appears to have been entered by collusion between the debtor offering and the plaintiff. *Everson v. Gehrman, Ante*, 167.
10. A judgment entered up against two partners upon an offer in writing made by one, will be set aside as irregular as against the other, unless there is evidence from which it may be inferred that he authorized or ratified the offer. *Binney v. Le Gal, Ante*, 283.
  11. The court will not set aside a judgment for non-service of summons when it appears that although the defendant had notice of an attempt to effect service upon him, he delayed to move, until supplementary proceedings were instituted. *Hilton v. Thurston, Ante*, 318.
  12. Where it appears that a defendant has endeavored to avoid the service of the summons, the court, on a motion to vacate the judgment for non-service of the summons, will require the defendant to furnish *satisfactory evidence* that he was not served. *Southwell v. Marryatt, Ante*, 218.
  13. If a married woman is sued alone on a contract made by her during coverture, and does not plead the coverture, but allows judgment to pass by default, and subsequently applies on motion, to the discretion of the court, to set aside the judgment and execution issued thereon, the court will not interfere when it appears in answer to the motion that she obtained the credit by representing herself to be a widow, and that the plaintiffs had no notice to the contrary; but will leave her to her remedy by appeal, or to other remedies that may exist for enforcing strictly legal rights. *Genet v. Dusenbury, 2 Duer*, 679.
  14. Where O. obtained judgment against R. individually upon a joint indebtedness of R. and W., partners, and subsequently the judgment was vacated by consent and without application to the court, the vacatur was afterwards, upon application made by W., so modified as to reserve the rights of W. and all others not parties to the record, so that the judgment was still evidence for them;—*Held*, that the judgment so reserved in force as respects the rights of W. was a good defence to an action brought against him upon the same cause. *Olmstead v. Webster, 4 Seld.*, 413.
  15. The old form of entering judgment upon bond and warrant of attorney to confess judgment, by declaration for the penalty of the bond, cognovit, and judgment for the penalty, is unauthorized by the Code. *Allen v. Smillie, Ante*, 354.
  16. The proper practice in entering judgment under the Code, upon confession, or upon bond and warrant of attorney, signed before July 1, 1848, defined. *Id.*

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17. *It seems*, that in entering judgment upon a bond and warrant of attorney above five years old, it is necessary to give the defendant notice of motion for judgment. *Ib.*
  18. Where the written statement and the affidavit in a confession of judgment are upon the same page, a signature to the affidavit alone is a substantial compliance with the provisions of the Code. In a confession of judgment, a statement that it is confessed for lumber and building materials furnished by the plaintiff to the defendant, or "for goods and groceries, and for one horse and one cow delivered to" the defendant, is insufficient. *Purdy v. Upton*, 10 *How. Pr. R.*, 494.
  19. Motion by one not a party, to set aside judgment by confession on account of insufficiency in the statement, is a "special proceeding," not an "action" under sections 1 and 11 of the Code, *Belknap v. Waters*, 1 *Kern.*, 477.
  20. It is a good defence to an action upon a judgment—whether brought by the original judgment creditor or his assignee—that the judgment was fraudulently obtained. *Dobson v. Pearce*, *Ante*, 97.
  21. A court of equity has jurisdiction to make a decree restraining a judgment creditor from bringing suits upon his judgment, upon the ground that it was fraudulently obtained. *Ib.*
  22. A duly authenticated record of such a decree rendered in a court of equity of another State having jurisdiction of the parties, is a *conclusive* defence against the prosecution in a court of this State, of a suit upon the judgment referred to in the decree. *Ib.*
  23. Such decree is conclusive upon the parties everywhere and in every forum where the same matters are drawn in issue; not indeed as an injunction, but as a judgment of a court of another State. *Ib.*
- ANSWER, 13; APPEAL, 1, 2, 4, 7, 12, 15, 16, 17, 18; ARREST, 4, 5; ATTACHMENT, 2; ATTORNEY, 4, 5; COMPLAINT, 5; COSTS, 11, 20, 21; CRIMINAL LAW, *tit.*, *Judgment*; EVIDENCE, *tit.*, *Judgments and Judicial Proceedings*, 2, 3, 4; EXECUTION, 1, 2; JOINT LIABILITY; JUSTICES' COURT *tit.*, *Jurisdiction*, 5; *tit.*, *Default*, 1; *tit.*, *Trial*, 5, 6, 7; MORTGAGE, 1; MOTIONS AND ORDERS, 210; PLEADING, 32; REDEMPTION; REPLEVIN, 3; SERVICE AND PROOF OF, 6; STAY OF PROCEEDINGS, 2; SUMMONS; TRIAL *tit.*, *Verdict*, 1; *tit.*, *New Trial*, 4; VERIFICATION, 1; WRIT OF ERROR.

## JURISDICTION.

1. There is no power in any of the courts of this State to entertain a suit brought against the State itself, except as authorized by statute. *Kiersted v. The People*, *Ante*, 385.

2. *Query?* whether the State courts have not jurisdiction over an offence committed upon navigable tide waters, wholly within the State, although the United States Court have already exercised jurisdiction over it. *People v. The Sheriff*, 1 *Parker's Cr. R.*, 659.
  3. The powers conferred by the General Government upon the State Courts, to admit aliens to citizenship, cannot be delegated to the clerks of those courts. They must be exercised by the courts themselves, upon a judicial examination of each case. *Clark's case*, *Ante*, 90.
  4. The failure of jurisdiction in a judicial officer, when a party to the proceeding before him—commented upon, and numerous cases cited. *Converse v. McArthur*, 17 *Barb.*, 410.
  5. The objection to the jurisdiction of the officer issuing attachment under 2 *Rev. Stats.*, 12, § 62, may be raised by any person who is sought to be affected by the appointment of trustees in the proceedings. *Van Alstyne v. Erwine*, 1 *Kern.*, 381.
  6. The court of last resort decides upon its own jurisdiction. *It seems* that when the Court of Appeals has in a decision asserted its want of jurisdiction over a class of cases, and subsequently in a case within such class, has entertained jurisdiction, the Supreme Court may disregard the appellate judgment as being beyond the jurisdiction of the Court of Appeals, unless there had been a professed re-examination of the question, and the former decision was recalled. *People v. Clark*, 1 *Parker's Cr. R.*, 360.
  7. Where the Court of Appeals have reversed a judgment of the Supreme Court, but without passing directly upon any objection to its own jurisdiction, that question remains open for the Supreme Court to consider before carrying into effect the judgment of reversal. *Ib.*
  8. When the United States Courts had assumed jurisdiction of a criminal offence, and subsequently the State Courts assumed jurisdiction of the same, upon *habeus corpus* issued to test the legality of the arrest in the latter court—*Held*, that the pending of the proceedings in the United States Courts was no ground for discharge. *The People v. The Sheriff*, *Ib.*, 659. Compare *The Republic of Mexico v. Arrangois*, *Ante*, 437.
  9. A defendant cannot appear in the New York Superior Court under protest to the jurisdiction based on a purely personal objection. *Manahan v. Penman*, *Ante*, 34.
- AMENDMENT, 8; APPEALS, 7; ARREST, 7; ATTACHMENT, 5; CRIMINAL LAW, *tit. Error*, 5; CORPORATION, 4; COUNTY COURT, 1; EVIDENCE, *tit. Judgments and Judicial Proceedings*, 3; JUDGMENT,

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21; JUSTICES' COURT, *tit. Jurisdiction*; PLEADING, 25; SESSIONS; SUPERIOR COURT, 1, 2, 3; SUPERVISORS, 2; SUPREME COURT; U. S. COURTS.

### JUSTICES' COURT.

[COSTS, 12, 13; EXAMINATION OF ASSIGNOR, 7; PLEADINGS, 9.]

#### *I. Jurisdiction.*

1. Where a plaintiff voluntarily brings his suit before the justice of a district in which neither plaintiff nor defendant resides, and goes to trial upon the merits, and recovers a judgment against the defendant, though for less than the plaintiff's demand, (it in no wise appearing on trial that the parties do not reside within such district,) the plaintiff cannot, by appeal from such judgment, require the appellate court to reverse the judgment upon the ground that the justice had no jurisdiction by reason of such non-residence. *Fairbanks v. Corlies, Ante*, 150.
2. *It seems*, that a judgment so procured is not *as to the* plaintiff, procured contrary to the meaning and intent of the statute requiring suits in the justices' courts to be brought in the district where one of the parties resides; and if otherwise, the plaintiff is so far precluded by his own voluntary acts that he cannot have a reversal on appeal. *Ib.*
3. A justice of a District Court in the city of New York can only proceed by short summons against a non-resident defendant upon proof before him of the defendant's non-residence. And it will not be presumed upon appeal from his judgment that the defendant was a non-resident. *Sperry v. Major*, 1 *E. D. Smith's C. P. R.*, 361.
4. But if the defendant appears and pleads to the merits, the objection is waived. The voluntary appearance gives the justice jurisdiction though the summons did not. *Andrews v. Thorp, Ib.*, 615.
5. A justice is to judge from the constable's return, and from that alone, whether the process in a suit has been served in a manner which gives him jurisdiction to proceed. The papers before him either show such service or they do not. If they do not he cannot proceed, whatever parol proof may be offered. If they show personal service upon the proper person, the justice acquires jurisdiction of the defendant for all purposes of enabling him to render a valid judgment. That his judgment may be reversed upon appeal or certiorari, for irregularity in the service, in no wise affects his jurisdiction where the proper process has been regularly issued and is returned personally served by the proper constable. Therefore, where in an action commenced against a corporation before a justice, the summons was



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- returned "personally served on W., a managing agent of the defendants":—*Held*, 1. That this return gave the justice jurisdiction. 2. That the return could not be contradicted collaterally by proof that W. was not such managing agent, for the purpose of defeating the judgment; the proper remedy of the defendants being by appeal or action against the constable for a false return. *The New York & Erie Rail Road Company v. Purdy*, 18 *Barb.*, 574.
6. The provision of the statute (2 *Rev. Stats.*, 275, § 2,) declaring that no judge of any court can sit as such in any cause in which he is a party, is applicable to a justice of the peace. *Baldwin v. McArthur*, 17 *Barb.*, 414.
7. In lien law proceedings, the Marine Court has power to cause a necessary party defendant to be brought in. *Lowber v. Childs*, *Ante*, 415; but see *Gates v. Ward*, 17 *Barb.*, 424.
8. When a "question of title to lands" arises in an action before a justice. *Smith v. Riggs*, 2 *Duer*, 622; *Hastings v. Glenn*, 1 *E. D. Smith's C. P. R.*, 402.
9. The fact that a series of payments have been made upon a claim for the balance of which suit is brought, does not render the action a case of mutual accounts within the meaning of the statute defining the jurisdiction of the justices' courts. *Ward v. Ingraham*, 1 *E. D. Smith's C. P. R.*, 538.
10. The provisions of the Code respecting the jurisdiction of the district or justices' courts in the city of New York, have not repealed the prohibitory act depriving such courts of jurisdiction in actions brought for the recovery of seamen's wages. *Collins v. Underwood*, *Ib.*, 318.
11. Where the trustees of a school district submitted a claim for the wages of a school teacher employed by them to the county superintendent of common schools, who decided adversely to it, and the teacher brought an action before a justice of the peace to recover the amount of the claim,—*Held*, that the justice had jurisdiction, and that the action was not barred by the decision of the county superintendent. *Reynolds v. Mynard*, *How. App. Cus.*, 620.

## II. Attachment.

1. Personal service of attachment in suits commenced by attachment in the N. Y. Marine Court must be made, if practicable, in order to give the court jurisdiction to proceed in the action. And if not personally served, a summons must be issued and returned, pursuant to § 38, ch. 300, of Laws of 1831, to authorize the Court to proceed. *Taylor v. Harker*, 1 *E. D. Smith's C. P. R.*, 391.
2. Requisites of a bond to discharge an attachment upon property of a

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non-resident, issued out of the Marine Court. *Morange a. Edwards, Ib., 414.*

### III. Summons.

1. The provision of the statute (2 *Rev. Laws*, 371, § 87), requiring a summons issued from a District Court to state the nature of plaintiff's cause of action, is in no manner altered or repealed by the Code; nor is the manner of stating such cause of action governed by the Code. But the defendant waives any objection to the form of the summons in this respect, by pleading and going to trial upon the merits. *Bray a. Andreas, Ib., 387.* And see *Cushingham a. Phillips, Ib., 416.*

### IV. Security.

2. Of the security necessary to be given by a non-resident plaintiff suing by short summons in the N. Y. Marine Court. *Jackson a. Whedon, Ib., 141.*

### V. Pleadings.

1. A denial of knowledge sufficient to form a belief not allowable in answers in justices' courts. *Dennison a. Carnahan, Ib., 144.*
2. Where the defendant, in a justice's court, did not deny the plaintiff's claim, but merely alleged a set-off which was not proven on the trial, —*Held*, that judgment should have been rendered for the plaintiff. *Gregory a. Trainer, Ante, 209.*
3. In a justice's court, a party whose pleading has been held to be defective, has an absolute right to amend; and it is the imperative duty of the justice to reserve that right by the terms of the order. (13 *Barb.*, 533). *Hillard a. Austin, 17 Barb., 141.*
4. A justice of the peace has no power to amend a complaint, by adding the name of an additional plaintiff. It is doubtful whether he can amend by striking out the name of a plaintiff. *Gates a. Ward, Ib., 424.*
5. A justice of a district court has no authority to entertain a motion to strike out a complaint or answer, either in whole or in part. The Mayor, &c., of the City of New York *a. Mason, Ante, 344.* And see *Hillard a. Austin, 17 Barb., 141.*
6. Nor can he amend a pleading of his own motion. *Lloyd a. Fox, 1 E. D. Smith's C. P. R., 101.*
7. In a justice's court, a plea in bar is a waiver of a plea in abatement. *Monteith a. Cash, 1 E. D. Smith's C. P. R., 412.* *Andrews a. Thorp, Ib., 615.*
8. If a complaint in a justice's or district court is not sufficiently certain and explicit, the defendant's only remedy is by demurrer. The Mayor, &c., of the City of New York *a. Mason, Ante, 344.*

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9. The rule should be inflexible in courts of justices of the peace that no motion which is a substitute for a demurrer can be entertained after the issue of fact has been joined, and the parties are ready with their witnesses for trial. *Hillard v. Austin*, 17 *Barb.*, 141.
10. Joining issue upon the merits after demurrer overruled in a justice's court, waives the demurrer. *Harper v. Leal*, 10 *How. Pr.R.*, 276.

## ANSWER 21; PLEADING.

## VI. Default.

1. A justice is entitled to proceed with a case immediately upon the expiration of the time named in the summons, and where, so proceeding, he has rendered judgment, he has no power to open it upon the defendant's coming in immediately after, and asking to be let in to defend. *Appleby v. Strang*, *Ante*, 143; and see *Sperry v. Major*, 1 *E. D. Smith's C. P. R.*, 361.
2. The defendant in an action in a justice's court appeared personally, put in an answer, and consented to an adjournment. On the adjourned day, an agent appeared in his name, without stating that he was only authorized to appear for the purpose of consenting to a further adjournment, proceeded to procure a subpoena, to examine witnesses, and otherwise conduct the trial, on behalf of the defendant. Upon an application for a new trial, under section 366 of the Code, (which permits a justice's judgment to be opened where the defendant *failed to appear*, and it is shown that *manifest injustice* has been done, and defendant *excuses his default*,) the defendant put in affidavits that he did not appear on the trial for the reason that he supposed there was a valid agreement between himself and one of the plaintiffs for a further adjournment; and that his agent was merely authorized to appear for him, for the purpose of consenting to the adjournment. *Held*—
  1. That section 366 does not confine the failure to appear to a case where the defendant does not answer on the return of the summons, but extends to a case of failure to appear pursuant to an adjournment.
  2. That there was not in the present case a failure to appear, inasmuch as the appearance and testimony of the agent fully justified the justice in proceeding with the trial, and constituted a legal appearance.
  3. That if the agent had disobeyed the instructions of the defendant in trying the cause, the remedy of the latter was against the agent.
  4. That if defendant had honestly believed that an adjournment had been agreed upon, and in consequence had been induced to absent himself from the trial, this would have furnished a sufficient excuse for his default.

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5. That a bare affidavit of merits is not sufficient in these cases to show that manifest injustice has been done; but facts and not conclusions must be stated, to enable the court to see that such injustice exists.
6. That in the present case the affidavits read on the part of the defendant were not sufficiently explicit in this respect. *Armstrong v. Craig*, 18 *Barb.* 387. As to the first point held, see *contra Mix v. White*, 1 *E. D. Smith's C. P. R.*, 614. As to the second point held, see also *Bunker v. Latson*, 1 *E. D. Smith's C. P. R.*, 410.
8. To enable the court to open a justice's judgment, under section 366 of the Code, the defendant must not only show a default to appear, and excuse it, but must show that manifest injustice has been done. *Mix v. White*, 1 *E. D. Smith's C. P. R.*, 614.
4. Defendant's attorney having suffered default in a district court, by being delayed in arriving at court by circumstances liable to occur without his fault, he being under the misapprehension that no defaults were taken until half an hour after the return hour of the summons. *Held*, that the default was excusable. *Seymour v. Elmer*, *Ante*, 412.
5. The only witness for plaintiff being the assignor of the claim sued on, an affidavit by the defendant that injustice was done to him—*Held*, under certain circumstances, to be sufficient upon that point, on a motion to open the judgment. *Id.*

## VII. Adjournment.

1. A second adjournment of a cause by a justice of the peace, in the absence of the parties and their attorneys, is void, notwithstanding it is made upon the written consent of both parties. The irregularity may be waived by the parties appearing and proceeding to trial without objection, pursuant to the adjournment. *Weeks v. Lyon*, 18 *Brb.*, 530.
2. The refusal of the justice of a district court to suspend a trial, after witnesses have been examined, for the purpose of enabling one of plaintiff's witnesses to leave the court to search for papers mentioned in a *subpœna duces tecum*, served on such witness by the plaintiff shortly before the witness was sworn, is no ground for reversing the judgment. *Fairbanks v. Corlies*, *Ante*, 150.

## VIII. Trial.

1. Where a defendant is in good faith brought before a justice by summons, and there admits the indebtedness specified in the plaintiff's complaint, judgment may be rendered against him as is usual in a suit; and no affidavit, or proof, or confession in writing is necessary. *Gates v. Ward*, 17 *Brb.*, 424.
2. The time and mode of demanding a jury in a District Court in the city of New York. *Shannon v. Kennedy*, 1 *E. D. Smith's C. P. R.*, 346.

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3. The practice in the district courts of the city of New York in respect to *summoning*, *empanneling*, and *challenging* jurors, defined. The Mayor, &c. of the City of New York *a. Mason, Ante*, 344.
4. In a District Court the opening of a case for further testimony, even after the parties have rested, but prior to the *final* submission, is in the discretion of the justice, provided the parties with their witnesses are all present, and it does not appear that the opposing party is prejudiced. Harpell *a. Curtis*, 1 *E. D. Smith's C. P. R.*, 78; and see Breidert *a. Vincent. Ib.*, 542.
5. The verdict of a jury in a justice's court upon a question of fact is conclusive, notwithstanding that it may appear to be against the weight of evidence. It is only when the facts are undisputed or the evidence unconflicting and free from reasonable doubt that it can be set aside as contrary to evidence. Bennett *a. Scutt*, 18 *Barb.*, 347; Easton *a. Smith*, 1 *E. D. Smith's C. P. R.*, 318.
6. Where the evidence adduced upon a trial before the justice of a district court is conflicting, the finding of the justice will be deemed conclusive upon the facts. Fairbanks *a. Corlies, Ante*, 150.
7. The N. Y. Common Pleas will not reverse the decision of a justice of the marine or district court upon a question of fact, unless the decision is against the weight of evidence so clearly that if it were the verdict of a jury it would be reversed. Heim *a. Wolf*, 1 *E. D. Smith's C. P. R.*, 70. Harpell *a. Curtis, Ib.*, 78. Decker *a. Jaques, Ib.*, 80.

## EXAMINATION OF ASSIGNOR, 7.

## IX. Execution.

1. Under 2 *Rev. Stats.*, 225, § 1, a justice of the peace may not issue an execution after the two years have expired; but he may renew an unsatisfied execution by indorsement, from time to time, beyond that limit. Morse *a. Goold*, 1 *Kern.*, 281.

## X. Appeal.

A defect in a notice of appeal in an action in a justice's court will not be considered on the hearing of the appeal. The respondent's remedy is by motion to dismiss the appeal. (2 *Sandf.*, 227.) Nye *a. Ayres*, 1 *E. D. Smith's C. P. R.*, 532.

## LEGATEE.

Certain errors in the proceedings in a suit brought against legatees or devisees to compel them to refund, on the ground that the personal estate of their testator had proved insufficient for the payment of his debts—pointed out. Wambaugh *a. Gates*, 1 *How. App. Cus.*, 247.

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## LICENSE.

The fact that the commissioners of excise for a particular ward or district refuse to license any persons to sell spirituous liquors, does not justify any person in selling them without a license. The Mayor, &c., of the City of New York *a. Mason, Ante.*, 344.

EVIDENCE, *tit. Burden of proof*, 3; INJUNCTION, 11.

## LIBEL.

DEFAMATION.

## LIEN.

ATTORNEY, 3, 4; MECHANIC'S LIEN.

## LIMITATION OF ACTIONS.

1. Under the provisions of section 100 of the Code, respecting the limitation of actions, the aggregate of the debtor's absences from the State and not the first one only, is to be deducted. *Cole a. Jessup*, 10 *How. Pr. R.*, 515.
2. Where one of several partners, who while out of the State contracted a debt to creditors within the State, came here and procured a discharge under the bankrupt act of 1841, and afterwards, and more than six years after the contracting of the debt, his co-partner came within the State, and was sued upon the indebtedness.—*Held*, that the statute was no bar to the action. *Davis a. Kinney, Ante*, 440.
3. To take a case out of the statute of limitations, there must be an express promise or an admission of a subsisting debt, and a willingness to pay, so clear that a promise may be implied. The fact of a partial payment is only reliable as evidence of a promise or a fact from which a promise may be implied. *Bloodgood a. Bruen*, 4 *Seld.*, 362. *Shoemaker a. Benedict*, 1 *Kern.*, 176.
4. Subsequent promise or partial payment by one joint debtor, unless authorized by his co-debtors, does not take the debt out of the statute of limitations as to them. Their defence remains good whether his acknowledgment was made before the statute attached to the original debt or afterwards. The action must be upon the new promise; and a promise by one unauthorized by the others is not a cause of action except against the one making it. *Shoemaker a. Benedict*, 1 *Kern.*, 176. *Bloodgood a. Bruen*, 4 *Seld.*, 362.
5. The provision of the statute of limitations which requires that all actions against sheriffs upon any liability incurred by the doing of any act in their official capacity, shall be brought within three years,

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applies to the case where a sheriff seizes and sells the property of B. upon an execution against A. *Dennison v. Plumb*, 18 *Barb.*, 89.

PLEADING, 23, 24.

## LUNATICS AND HABITUAL DRUNKARDS.

1. The power to take the persons and property of lunatics and habitual drunkards into judicial custody considered. *Brown's Case*, *Ante*, 108.
2. Inquisitions of lunacy and of habitual drunkenness are analogous to a proceeding *in rem*. They are public and notorious, and are conclusively presumed to be known to those who subsequently deal with the subjects of them. *Wadsworth v. Sharpsteen*, 4 *Seld.*, 388.

SUPERIOR COURT, 3.

## MANDAMUS.

1. Mandamus will only lie to enforce a clear legal right, and when a remedy at law is wanting or doubtful. *People v. Chenango*, 1 *Kern.*, 563.
2. A mandamus will not be granted to compel a moneyed corporation to make transfers of stock;—that writ is only allowed for the purpose of enforcing a public duty owed to the State in which it issues. The *People v. The Parker Vein Coal Company*, *Ante*, 128. For opinion on the merits by MORRIS, J., see S. C., 10 *How. Pr. R.*, 543.
3. Mandamus will lie to compel the supervisors to meet and issue warrants for the collection of military commutation, which they refused to issue at their annual meeting. *People v. Chenango*, 4 *Seld.*, 317.
4. Mandamus will lie to compel a board of trustees of a school district to issue a warrant, upon order of the supervisors, for the collection of a claim of an officer of the district for costs incurred by him. *People v. Green*, 10 *How. Pr. R.*, 468.

SUPERVISORS, 1.

## MARINE COURT.

JUSTICES' COURT.

## MARRIED WOMEN.

Where a married woman conveys her real estate acquired since the act of April 7, 1848, the deed may be drawn in the same form, and executed and acknowledged in the same manner, as if she were unmarried; and no private examination is necessary. *Blood v. Humphrey*, 17 *Barb.*, 660.

COSTS, 10; JUDGMENT, 13; PARTIES, 18, 19.

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## MECHANICS' LIEN LAW PRACTICE.

Application of lien law to contracts made before its passage considered.

Brien *a. Clay*, 1 *E. D. Smith's C. P. R.*, 649; McBride *a. Crawford*, *Ib.*, 658; Sullivan *a. Brewster*, *Ib.*, 681; Miller *a. Moore*, *Ib.*, 739.

Lien law not applicable to work done before its passage. Donaldson *a. O Connor*, *Ib.*, 695.

Requisites of the notice creating the lien. Beals *a. Congregation B'nai Jeshurun*, *Ib.*, 654.

It must be verified in the same form as a pleading. *Laws of 1855*, 760, *ch.* 404.

Time of filing the notice of lien. Donaldson *a. O'Connor*, 1 *E. D. Smith's C. P. R.*, 695.

Plaintiffs' recovery limited to the amount claimed in the notice. Protective Union *a. Nixon*, *Ib.*, 671.

Requisites of notice to defendant. Tinker *a. Geraghty*, *Ib.*, 687.

Requisites of complaint. Doughty *a. Devlin*, *Ib.*, 625; Dixon *a. La Farge*, *Ib.*, 722; Broderick *a. Boyle*, *Ante*, 319; Quin *a. McOlliff*, *Ante*, 322; Foster *a. Poillon*, *Ante*, 321.

Demurrer lies to complaint. Doughty *a. Devlin*, 1 *E. D. Smith's C. P. R.*, 625.

Who are proper parties defendant. Kaylor *a. O'Connor*, *Ib.*, 672; Sullivan *a. Decker*, *Ib.*, 699; Foster *a. Skidmore*, *Ib.*, 719; Lowber *a. Childs*, *Ante*, 415.

Contractors are proper parties. *Laws of 1855*, 760, *ch.* 404.

Proper mode of bringing in new parties when necessary. Foster *a. Skidmore*, 1 *E. D. Smith's C. P. R.*, 719; and see Lowber *a. Childs*, *Ante*, 415.

Priority of liens considered. Kaylor *a. O'Connor*, 1 *E. D. Smith's C. P. R.*, 672.

Notice must be given to other lienors, &c. *Laws of 1855*, 760, *ch.* 404.

Effect of prior liens as defence to the owner. Lehretter *a. Koffman*, 1 *E. D. Smith's C. P. R.*, 664.

Effect of contract between contractor and owner upon the rights of the laborer. Doughty *a. Devlin*, *Ib.*, 625; Cronk *a. Whittaker*, *Ib.*, 647; Kennedy *a. Paine*, *Ib.*, 651; McBride *a. Crawford*, *Ib.*, 658; Hauptman *a. Halsey*, *Ib.*, 668; Sullivan *a. Brewster*, *Ib.*, 681; Tinker *a. Geraghty*, *Ib.*, 687; Allen *a. Carman*, *Ib.*, 692; Spalding *a. King*, *Ib.*, 717; Dixon *a. La Farge*, *Ib.*, 722; Gay *a. Brown*, *Ib.*, 725; Pendleburg *a. Meade*, *Ib.*, 728; Miller *a. Moore*, *Ib.*, 739; Broderick *a. Boyle*, *Ante*, 319; Quin *a. McOlliff*, *Ante*, 322; Linn *a. O'Hara*, *Ante*, 360.



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Proceedings under the lien law, proceedings *in rem* not in *personam*.

Cronkright *a. Thomson*, 1 *E. D. Smith's C. P. R.*, 661. Gridley *a. Rowland*, *Ib.* 670.

Set off. Owens *a. Ackerson*, *Ib.*, 691. Gourdier *a. Thorp*, *Ib.*, 697.

Bill of interpleader denied under special circumstances. Chamberlain *a. O'Connor*, *Ib.*, 665.

Subcontractor competent witness in an action by a laborer against owner. Cusack *a. Tomlinson*, *Ib.*, 716.

Whether proceedings under the lien law bar a civil action for the debt, *Query?* Westervelt *a. Levy*, 2 *Duer*, 354. Ogden *a. Bodle*, *Ib.*, 611. Gridley *a. Rowland*, 1 *E. D. Smith's C. P. R.*, 670.

Nonsuit a bar to a subsequent proceeding. Sullivan *a. Brewster*, 1 *E. D. Smith's C. P. R.*, 681.

Writ of inquiry may issue, or reference may be taken in the Common Pleas to assess damages, &c., *Laws of 1855*, 760, *ch.* 404.

Form of judgment. Doughty *a. Devlin*, 1 *E. D. Smith's C. P. R.*, 625. *Laws of 1855*, 760, *ch.* 404.

Sales shall be subject to prior liens unless the claimants of such liens are made parties. *Laws of 1855*, 760, *ch.* 404.

JUSTICE'S COURT, *tit. Jurisdiction*, 7.

## MORTGAGE.

1. In an action for the foreclosure of a mortgage, under the statute, the court are not authorized to make a decree of sale, except for the purpose of satisfying the mortgage and costs. *Mechanics' and Traders' Savings Institution a. Roberts*, *Ante*, 381.
2. A sale will not be ordered for the purpose of satisfying a junior mortgage, the mortgagee in which, has been joined as defendant, *Ib.*
3. An action brought against the holder of a mortgage to declare void and cancel the mortgage, is no ground for injunction restraining the prosecution of a subsequent foreclosure suit brought by the mortgagee upon the mortgage. *Tarrant a. Quackenbos*, 10 *How. Pr. R.*, 244.
4. In an action to foreclose a mortgage, under the foreclosure act of 1840, a notice of *Lis pendens*, omitting to state in what county the mortgage is recorded, may be regarded as a sufficient compliance; and although it might be good ground to open the judgment for irregularity, upon proper motion, it does not render the proceedings invalid. The decree cannot be objected to in a collateral action. *Potter a. Rowland*, 4 *Seld.*, 448.

AMENDMENT, 7, 8; CHATTEL MORTGAGE; CORPORATION, 8; EVIDENCE, *tit. Parol Proof to expl.in, &c.*, 1; Parties, 11.

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## MOTIONS AND ORDERS.

1. A motion to dismiss an appeal pending at General term, will not be entertained at Special term. *Harris a. Clark*, 10 *How. Pr. R.*, 415.
2. Application to correct the form of a judgment of the general term may be made at special term. *De Agreda a. Mantel*, *Ante*, 130.
3. Motions at chambers not heard on the day for which they are noticed in consequence of the inability of the court to hear the same, stand over as a matter of course until the next day, unless a different disposition be ordered or consented to. *Mathis a. Vail*, 10 *How. Pr. R.*, 458.
4. An order made by one justice at special term, *held*, by the general term, to have been properly modified by another justice at special term. *Selden a. Christophers*, *Ante*, 272.
5. The fair import of section 401 of the Code is, that no motion shall be made in the First Judicial District in a cause in which the venue is laid in another district. *The Canal Bank a. Harris*, *Ante*, 192.
6. An order granted *ex parte* at special term, in the First District, staying proceedings in an action triable in another district, is void. The same is true of an order so made at general term after argument. If made by a judge at chambers it might be different. But where such an order was granted staying proceedings under a previous order, in consequence of which the defendant disobeyed a previous order, a motion for an attachment was refused. *Harris a. Clark*, 10 *How., Pr. R.*, 415.
7. An order staying proceedings granted at general term in one district, upon an appeal which the party moved on in violation of an order staying proceedings, granted at special term in another district, is irregular and will be set aside as such. *Ib.*
8. Where the defendant moves to dissolve an injunction upon affidavits on his part as distinguished from the original papers on the part of the plaintiff, the plaintiff may introduce new affidavits to oppose the motion, and sustain the injunction. A verified answer is an affidavit within the meaning of this rule. *Hollins a. Mallard*, *Ib.*, 540.
9. Verified complaint allowed to be read in support of defective affidavits on which an order of arrest had been obtained. *Brady a. Bissell*, *Ante*, 76.
10. The decision of a judge allowing an application for judgment upon an answer as frivolous, is not a judgment but an order that plaintiff is entitled to judgment; and, it is appealable under section 849 of the Code. *Western R. R. Corporation a. Kortright*, 10 *How. Pr. R.*, 457.
11. Where an application for an order of maintenance was in fact made

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to and granted by, the Court of Sessions of St. Lawrence County, but the order as entered purported to be made by the "*county court of sessions*,"—*Held*, in an action upon the order, that the word *county* prefixed to the description of the court might be treated as mere surplusage; no objection to the error having been made at the time when the order was entered. (5 *How. Pr. R.*, 3.) *Baldwin v. McArthur*, 17 *Barb.*, 414.

12. An order extending the time to answer founded upon an affidavit stating the name of defendants' attorney and his absence from the city, was obtained by defendant, and copies of the order and affidavit were served upon the plaintiff's attorney,—*Held*, equivalent to a formal notice of appearance. *Quin v. Tilton*, 2 *Duer*, 648.
13. A motion to strike out portions of a complaint is embraced in a stipulation extending the defendant's time to answer, and to make such application as he should be advised. *Lackey v. Vanderbilt*, 10 *How. Pr. R.*, 155.

ANSWER, 1, 7, 16; APPEAL, 2, 3, 5, 12; ARREST, 6; ATTACHMENT, 3; COMPLAINT, 4, 7, 18, 31; COSTS, 14, 15, 17, 18, 19; COURT, 2, 3, 4, 5; EXCEPTIONS, 7; JUDGMENT, 12, 13, 14, 17, 19; JUSTICES' COURT, *tit. Pleading*, 5, 9; PLEADING, 17, 18, 26; RECEIVER, 2; REFERENCE, 4; SATISFACTION OF PART OF PLAINTIFFS' CLAIM; SERVICE AND PROOF OF, 8; STAY OF PROCEEDINGS, 3; SUPPLEMENTARY PROCEEDINGS, 1.

## NOTICE OF PROTEST.

1. What notice of protest is sufficient. *Youngs v. Lee*, 18 *Barb.*, 187; *Otsego County Bank v. Warren*, 18 *Barb.*, 290; *Pierson v. Boyd*, 2 *Duer*, 33. And see *Coyle v. Smith*, 1 *E. D. Smith's C. P. R.*, 400.
  2. Any private citizen may, if authorized by the holder, demand payment of a note, and give notice of its non-payment with the same effect as if done by a notary. *Cole v. Jessup*, 10 *How. Pr. R.*, 515.
- EVIDENCE, *tit. Public Documents*, 2; *tit. Private Writings*, 2.

## OATH.

An oath irregularly administered by mistake, *e. g.* upon Watts' Psalms and Hymns, instead of upon the gospels, is a valid oath. If the party taking it makes no objection, at the time, he is deemed to have assented to the particular form adopted, and is liable to perjury, as if the oath had been regularly administered. *The People v. Cook*, 4 *Seld.*, 67.

TRIAL, *Tit. Examination of Witness*, 5.

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## OFFER TO ALLOW JUDGMENT.

AMENDMENT, 3; COSTS, 11; JUDGMENT, 10; SATISFACTION OF PART OF PLAINTIFF'S CLAIM, 1.

## OYER AND TERMINER.

1. The Court of Oyer and Terminer of the city and county of New York may send indictments to the Court of General Sessions for trial. *Laws of 1855*, 613, *Ch.* 337.
2. The Court of Oyer and Terminer has power to grant a new trial on the merits in a case of felony. *People v. Morrison*, 1 *Parker's Cr. R.*, 625. And see *The People v. The Court of Sessions of Wayne County*, 1 *Parker's Cr. R.*, 369.

CRIMINAL LAW, *tit. Recognizance and Bail*, 5.

## PARTIES.

1. Whether the title of an assignee of a chose in action be legal or equitable, if he has the *whole interest* he may sue in his own name. *Hastings v. McKinley*, 1 *E. D. Smith's C. P. R.*, 273.
2. The old rule that a bond must be sued in the name of the obligee is abrogated by the Code; the suit must now be in the name of the real party in interest. And where an administration bond is assigned to a creditor of the estate to be prosecuted, such creditor is the real and only party in interest, and should sue in his own name. It would be useless to sue in the name of the people on the relation of such creditor. *Baggott v. Boulger*, 2 *Duer*, 160.
3. The assignee of a life policy, in trust for the wife of the assured, may, upon the death of the latter, sue in his own name, as trustee of an express trust, for the sum insured. Neither the wife nor the personal representatives of the assured are necessary parties. *St. John v. The American Mutual Life Insurance Company*. *Ib.*, 419.
4. An action for conversion will lie at suit of a factor who has stored property consigned to him, with a third party, from whose possession it has been taken by a wrong doer. *Gorum v. Carey*, *Ante*, 285.
5. An auctioneer who in his own name sells goods for a third person, is the trustee of an express trust within the meaning of section 113 of the Code, and as such may sue upon the contract of sale without an assignment of the claim. *Bogart v. O'Regan*, 1 *E. D. Smith's C. P. R.*, 590.
6. The mere holder of a promissory note, who has no interest in it cannot now maintain an action upon it. Such action can only be prosecuted in the name of the owner of the work, or the real party in interest. *Parker v. Totten*, 10 *How. Pr. R.*, 233.

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7. Although the captain of a vessel has made a verbal arrangement with the owner for purchase of an interest, yet if he has not taken any conveyance he is not a necessary co-plaintiff in an action by the owner upon a charter party. *Ward v. Whitney*, 4 *Seld.*, 442.
8. Tenants in common may properly join in an action for use and occupation without having a joint demise. (*Broom on Parties*, 27, § 32; 13 *Johnson*, 286; 6 *Ib.*, 108; 8 *Ib.*, 151; 15 *Ib.*, 482; 8 *Cow.*, 308; 5 *Hill*, 56; 6 *Hill*, 634.) *Porter v. Bleiler*, 17 *Burb.*, 149.
9. The commissioners of highways of two towns cannot unite as plaintiffs in an action to recover a penalty or forfeiture, for an encroachment upon a highway, even although the highway were upon a line between the two towns. *Bradley v. Blair*, *Ib.* 480. Compare *Palmer v. The Fort Plain & Cooperstown Plank Road Co.*, 1 *Kern.*, 376.
10. The attorney general is a necessary party to a suit which seeks relief against an act of a municipal corporation, which works a public injury to the whole community over which the corporate jurisdiction extends. *Davis v. The Mayor, &c. of N. Y.*, 2 *Duer*, 663.
11. In an action for specific performance of a contract of lands, prior mortgagees are not proper parties where it does not appear that they are about to foreclose. *Chapman v. Draper*, 10 *How. Pr. R.*, 367.
12. Where there is a joint contract or liability and one party is dead, the other only should be sued; but where the contract or liability is joint and several, the representatives of the deceased are necessary parties. *De Agreda v. Mantel*, *Ante*, 130.
13. The rule, formerly well settled, that the representatives of a deceased member of a firm cannot be sued for a debt due from the partnership, unless insolvency of the surviving members, or some other ground of relief against them be shown,—has not been changed by the Code. *Voorhies v. Baxter*, *Ante*, 43; *Higgins v. Freeman*, 2 *Duer*, 650.
14. But the misjoinder cannot be set up in the answer of the representatives; but they must point out the defect, either by demurrer or by objecting at the trial that the complaint shows no cause of action as against them. *Higgins v. Freeman*, *Ib.*
15. The several modes by which the representatives of a deceased party to a suit may be, when necessary, made parties to the suit,—pointed out. *De Agreda v. Mantel*, *Ante*, 130.
16. The only exception to the rule that persons only severally liable cannot be joined in the same action as defendants, is that created by section 120, relating to persons severally liable upon the same obligation or instrument. Therefore a principal debtor and his guaran-

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- tor, sought to be held upon a collateral undertaking, cannot be sued together. *Le Roy a. Shaw*, 2 *Duer*, 626.
17. The objection that there is a defect of parties plaintiff, or that the plaintiff has not legal capacity to sue, is waived unless taken by demurrer or answer. *Belshaw a. Colie*, 1 *E. D. Smith's C. P. R.*, 213; *Hastings a. McKinley*, *Ib.*, 273.
18. In an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se*, the husband is a necessary party as plaintiff. Where the words are actionable only by reason of special damages, the husband must sue alone. *Klein a. Hentz*, 2 *Duer*, 633.
19. Whenever a married woman sues her husband, she must appear by next friend; whether the action be for an absolute divorce or for any other relief. *Thomas a. Thomas*, 18 *Barb.*, 149.
20. An infant may maintain an action for use and occupation, suing by next friend, although he has a general guardian. *Porter a. Bleiler*, 17 *Barb.*, 149.
- ANSWER, 23; COMPLAINT, 23, 28, 32; DEMURRER, 1; EXAMINATION OF PARTIES; GUARDIAN AD LITEM, 2; JURISDICTION, 4; JUSTICES' COURT, *tit. Jurisdiction*, 6; PLEADING, 13; WITNESS, *tit. Competency*, 3.

## PARTITION.

In an action for the partition of real estate, an order for sale, though made without a reference as to general liens, and without any advertisement for them, is not void; but the parties who choose to omit this ordinary advertisement should produce at their own cost, for the purchaser, regular searches for all judgments and decrees for at least twenty years. A sale by the court in such a suit, brought by heirs for the partition of their ancestor's estate, does not supersede the power of the surrogate to sell the same property to satisfy the debts of the deceased. A purchaser at such a sale is not bound to rely upon the affidavit of the administrator that there are no such debts. *Hall a. Partridge*, 10 *How. Pr. R.*, 188.

## PARTNERSHIP.

1. A partnership may exist between two firms. *Smith a. Wright Ante*, 243.
2. Agreement for the dissolution of a partnership reformed in equity upon the ground of mistake, by striking out one of its provisions. *Le Roy a. Lowber*, *Ante*, 67.

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3. No power is implied as within the scope of partnership authority, unless such as the partners can be presumed to have intended to grant each other. *Everson v. Gehrman*, *Ante*, 167.
  4. A surviving partner has the power to assign any chose in action; *e. g.* a bond and mortgage belonging to the late firm. *Pinckney v. Wallace*, *Ante*, 82.
  5. Of the modes of proceeding in an action by a member of a voluntary association to dissolve the partnership. *Kapp v. Barthan*. 1 *E. D. Smith's C. P. R.*, 622.
- ANSWER, 20; INJUNCTION, 1, 2; JOINDER OF ACTIONS, 5; JUDGMENT, 9, 10, 14; LIMITATIONS OF ACTIONS, 2; PARTIES, 13.

## PERJURY.

What is necessary to constitute a valid reference of an action, for the purposes of supporting an indictment for perjury committed in giving false testimony before the referee. *The People v. McGinnis*, 1 *Parker's Cr. R.*, 387.

CRIMINAL LAW, *tit. Indictment*, 4; *tit. Evidence*, 2; OATH; WITNESS, *tit. Competency*, 13.

## PLEADING.

1. Analogies of the old system of pleading, not a safe guide under the Code. *Bush v. Prosser*, 1 *Kern.*, 347.
2. Two prominent elements intended in the new system are, that falsehoods should not be put upon the record, and that the pleadings should disclose the facts relied on in support or defence of an action, *Ib.*
3. Pleadings to be liberally construed under the Code. *St. John v. Griffith*, *Ante*, 39.
4. The facts which the Code requires to be set forth in the pleadings, are not propositions which are true in law, but physical facts capable as such of being established by evidence, and from which the right to maintain the action or the defence is a necessary conclusion of law. *Lawrence v. Wright*, 2 *Duer*, 673. See *Drake v. Cockroft*, *Ante*, 203.
5. The rule of the old practice, that a pleading shall be construed most strongly against the pleader, is abrogated by the Code. *Richards v. Edick*, 17 *Barb.*, 260.
6. Hypothetical pleading sometimes allowable. *Ketcham v. Zerega*, 1 *E. D. Smith's C. P. R.*, 553. *Van Rensselaer v. Layman*, 10 *How. Pr. R.*, 505.
7. Where the objection to the validity of a law is an alleged failure of the legislature to comply with the provisions of the constitution, which

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is not apparent in the act itself, the nature of the failure should be distinctly set forth in the pleadings. The presumption is that a law published under the authority of the government was correctly passed; at least as to matters of form. *People v. Chenango*, 4 *Seld.*, 317.

8. The rule that an action for the purpose of setting aside an assignment as fraudulent and void as against creditors, can only be maintained by a judgment creditor, and after return of execution unsatisfied, has not been affected by section 219 of the Code. That section doubtless enlarges the powers of Court to grant injunctions, but does not enlarge the rights of the plaintiff in any case to maintain his action. The cases in which a temporary injunction may be granted, are all cases in which it appears by the complaint that the plaintiff is entitled to the relief demanded. But the question whether he is or is not entitled to that relief is left to be determined by the law as previously existing and established. *Neustadt v. Joel*, 2 *Duer*, 530. Compare also *Bishop v. Houghton*, 1 *E. D. Smith's C. P. R.*, 566. But see *Mott v. Dunn*, 10 *How. Pr. R.*, 225.
9. As to pleadings in actions of trespass brought before a justice of the peace prior to the Code. *McKeon v. Graves*, 1 *How. App. Cas.*, 345.
10. And in such actions in the Supreme Court. *Rowland v. Fuller*, *Ib.*, 629.
11. It is improper to set up in an *answer* that the complaint does not contain facts sufficient to constitute a cause of action. *Slack v. Heath*, *Ante*, 331.
12. The proper mode of raising an objection to the amount of the plaintiff's claim, is by answer. *Moran v. Anderson*, *Ante*, 288.
13. Where it appears on the face of the complaint that there is an improper joinder of parties, the objection can only be taken by demurrer. *Baggott v. Boulger*, 2 *Duer*, 160.
14. The defendant cannot demur and answer to the same matter. *Munn v. Barnum*, *Ante*, 281.
15. In trying a demurrer to an answer, the whole of the answer should be taken together. *Beach v. Berdell*, 2 *Duer*, 327.
16. The defence of the Statute of Limitations must be set up by answer and not by demurrer. *Lefferts v. Hollister*, 10 *How. Pr. R.*, 383.
17. The N. Y. Common Pleas will not allow a demurrer to an answer which merely denies the allegations in the complaint. The only remedy for defects in such an answer is by motion to strike out, or to amend, or by application for judgment. *Ketcham v. Zerega*, 1 *E. D. Smith's C. P. R.*, 553.
18. The plaintiff's complaint contained eight counts in the common



form—the defendant's answer denied generally all the allegations of the complaint, and set up a counter-claim—the plaintiff's reply contained among other things a counter-claim to the defendant's counter-claim, and the defendants moved to strike out this portion of the reply. *Held*, that the defendants had mistaken their remedy; they should have demurred. Whether such a reply is good, *Query?* *Stewart v. Travis*, 10 *How. Pr. R.*, 148.

19. Where a complaint sets forth two distinct causes of action and a general demurrer to both is interposed, if either cause of action is good, the demurrer must be overruled. *Butler v. Wood*, *Ib.*, 222.
20. Section 162 of the Code merely relieves the party pleading an instrument for the payment of money only, from setting out the instrument according to its legal effect. He must still state his interest in or title to the instrument, and such other facts outside of it as are necessary to enable him to recover upon it. Thus where the instrument requires a consideration to support it, the consideration must be averred in the complaint. *Prindle v. Carruthers*, *Ib.*, 33.
21. The plaintiff as indorsee of a bill of exchange, sued the acceptor, declaring, under the statute of 1832, on the money counts, and appending a copy of the bill, with notice that it was his cause of action; but in the copy the indorsement was omitted. *Held*, that delivery was sufficiently averred by implication, that indorsement was not necessary to pass title, and that the bill was therefore admissible upon the trial of the cause. *Purdy v. Vermilyea*, 4 *Seld.*, 346.
22. Under the Code, the recitals of an instrument averred in a complaint to have been executed by the defendant, have the same effect as specific averments of the truth of the facts recited. But *WOODRUFF, J. dissented*. *Slack v. Heath*, *Ante*, 331.
23. In pleading a subsequent promise, in order to avoid the Statute of Limitations, it is necessary to aver definitely the time of such promise; a general averment of repeated acknowledgments amounts to nothing. *Bloodgood v. Bruen*. 4 *Seld.* 362.
24. Whenever a statute gives a cause of action or defence, it is sufficient in pleading it to follow the words of the act. *Cole v. Jessup*, 10 *How. Pr. R.*, 515.
25. Whether a general averment of the jurisdiction of a foreign tribunal is sufficient. *Query?* *Hollister v. Hollister*, *Ib.*, 532.
26. In an action to set aside an assignment for the benefit of creditors, an allegation that it was made for the purpose of delaying, hindering, and defrauding creditors,—*Held*, sufficient on demurrer. Whether it might not have been made more specific on motion; *Query?* *Mott v. Dunn*, *Ib.*, 225.

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27. Under the Code, the act of an agent should not be pleaded as the act of his principal. *St. John v. Griffith, Ante*, 39.
  28. Proceedings under the statute (2 *Rev. Stats.*, 505,) for forcible entry and detainer of a church owned by a religious society incorporated under the general act, should be in the name of the corporation, and not in the individual names of the trustees. *The People v. Fulton*, 1 *Kern.*, 94.
  29. Plaintiff suing as supervisor, described himself in the title of the complaint as Supervisor of North Hempstead, and commenced it,—“The complaint of the plaintiff above named, as supervisor as aforesaid, shows” &c.;—*Held*, on demurrer, a sufficient statement of the capacity in which he sued. *Smith v. Levinus*, 4 *Seld.*, 472.
  30. In an action brought to recover for services rendered, the defendant, under an answer which denies the allegations in the complaint; and denies that he is indebted to the plaintiff, is at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed. He may, for example, under such denials, prove that he never incurred the debt—or that the services, either in whole or in part, were rendered as a gratuity—or that the plaintiff had himself fixed a less price for them than he claimed to recover—or that they were rendered upon the credit of some other person than the defendant, &c. So doing is not an attempt to show an extinguishment of the alleged indebtedness by payment, release, or otherwise; but to show that such indebtedness never existed. *Schermerhorn v. Van Allen*, 18 *Barb.*, 29.
  31. If one of several pleas of a defendant going to the whole cause of action is sustained, it bars recovery by the plaintiff, notwithstanding some other issues may have been found in favor of the plaintiff. *Curtis v. Jones*, 1 *How. App. Cas.*, 137.
  32. Where the defendant pleads tender before suit, and pays the amount of his tender into court, and the plaintiff fails to show himself entitled to a larger sum, it is proper to render judgment for the defendant, but the sum paid into court belongs to plaintiff. *Logue v. Gillick*, 1 *E. D. Smith's C. P. R.*, 398.
- AMENDMENT; ANSWER; COMPLAINT; EVIDENCE, *tit. Burden of Proof*, 2; *tit. Judgments and Judicial Proceedings*, 5, 6, 7; *tit. In Certain Actions*, 1; JOINDER OF ACTIONS, 1; JUSTICES' COURT, *tit. Pleading*; PARTIES, 14, 17; REPLY.

## QUESTIONS OF LAW AND FACT.

TRIAL, *tit. Charge*.

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## RECEIVER.

1. A special receiver entitled to the instructions of the court. *Curtis a. Leavitt, Ante, 274.*
2. When judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver forbidding him to make any payments out of the fund without notice to the petitioners to institute such an action against the receiver and other parties, as they may be advised. *Hubbard a. Guild, 2 Duer, 685.*

SERVICE AND PROOF OF, 8; STATUTORY CONSTRUCTION, 4; SUPERIOR COURT, 1, 2.

## RECOGNIZANCE AND BAIL.

CRIMINAL LAW, *tit, Recognizance and Bail.*

## REDEMPTION.

Where premises have been sold on a judgment and execution, and have been redeemed from the purchaser by a junior judgment creditor, in an action of ejectment by an assignee for the benefit of creditors of the original owner, it cannot be shown that the judgment on which the first judgment creditor redeemed was paid before redemption—the owner's right of redemption having expired before that time. *Symonds a. Peck, 10 How. Pr. R., 395.*

## REFERENCE.

1. A reference can only be compelled where the court can see that the trial must necessarily involve the examination of a long account. It is not sufficient that in certain exigencies the examination of such an account will be requisite. *Keeler a. The Poughkeepsie and Salt Point Plank Road Company. Ib., 11.*
2. Where, in a cause submitted for decision upon the pleadings, it appears that the plaintiff is entitled to an account, but there are questions of fact material to the taking of such account, and no difficult questions of law, it may be referred to a referee to take proofs, and then upon the pleadings and proofs to take a final account. *Van Zant a. Cobb. Ib., 348.*
3. Action for a divorce for adultery, referable. *The People a. McGinnis, 1 Parker's Cr. R., 387.*

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4. The old practice, in moving a cause for reference, should be adhered to; and it devolves on the opposing party to show that difficult questions of law will arise. *Barber v. Cromwell*, 10 *How. Pr. R.*, 351.
5. Of the powers of referees, and of proceedings before them. *Mathews v. Jones*, 1 *E. D. Smith's C. P. R.*, 429.
6. The report of a referee as to a question of fact should not be set aside, unless against the weight of evidence so clearly that if it were a verdict of a jury it would be reversed. *Foster v. Coleman*. *Ib.* 85.
7. Where a cause has been submitted to a referee, he may, if he thinks the purposes of justice require it, re-open the case, to hear further testimony. *Duguid v. Ogilvie*, *Ante*, 145. And see *Harpell v. Curtis*, 1 *E. D. Smith's C. P. R.*, 78.

APPEAL, 10, 11; ATTORNEY, 7; COURT, 2; PERJURY, 1; SPECIAL PROCEEDINGS, 3; STATUTORY CONSTRUCTION, 4; TAXES, 5.

## REMITTITUR.

JUDGMENT, 6.

## REPLEVIN.

1. The right of a party to recover immediate delivery of a specific thing claimed, given by section 206 of the Code, does not deprive him of the right to dispense with this privilege, and await its restitution until he obtains judgment. *Vogel v. Badcock*, *Ante*, 176.
2. Personal property which has been re-delivered by the sheriff to the defendant, under section 211 of the Code, in an action for its claim and delivery, cannot be retaken by the plaintiff. But the plaintiff may have an injunction, restraining the defendant from injuring or disposing of it. *Hunt v. Mootry*, 10 *How. Pr. R.*, 478.
3. In an action against several defendants for the recovery of specific personal property, the court has undoubtedly the power to adjudge a return of the property in favor of such of the defendants as appear to be entitled to a return, and to refuse it as to such of them as are not. *Woodburn v. Chamberlin*, 17 *Barb.*, 446.
4. Of the liability of the defendant to arrest in an action to obtain the possession of personal property. *Reimer v. Nagel*, 1 *E. D. Smith's C. P. R.*, 256.

ANSWER, 25; ASSIGNMENT, 3, 5; COMPLAINT, 20, 21, 22, 25; JOINER OF ACTIONS, 3; TRIAL, *Til. Nonsuit*, 3; UNDERTAKING, 1, 2; WAIVER, 1.

## REPLY.

Plaintiff may reply to new matter contained in the answer, constituting

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a counter-claim, by denial, and by new matter not inconsistent with the complaint. *Laws of 1855, 54, ch. 44.*

## PLEADINGS.

## RETURN.

JUSTICES' COURT, *tit. Jurisdiction, 5.*

## SALE OF CHATTELS.

ASSIGNMENT, 5, 7 ; INTERPLEADER, 8.

## SATISFACTION OF PART OF PLAINTIFF'S CLAIM.

1. The distinction between an offer on the part of defendant to let judgment be taken against him for a specified sum, and his admission by answer that a part of plaintiff's claim is just. *Merritt v. Thompson, Ante, 223. Dusenberry v. Woodward, Ante, 443. Quintard v. Seacor, Ante, 393.*
2. When a fund in litigation has been brought into court, and the answer of defendant admits a part of it to be due to the plaintiff, but disputes his claim to the residue—the court may order the sum admitted to be due to be paid over to the plaintiff without prejudice to his further claims. *Merritt v. Thompson, Ante, 223.*
3. Previous offers by the defendant to pay that sum to the plaintiff in full satisfaction of his claims, form no reason why such an order should be refused. *Ib. Dusenberry v. Woodward, Ante, 443.*
4. Plaintiff sued to recover the price of goods sold to defendant, with damages for non-delivery of notes agreed to be given in payment for them. The defendant, by answer admitted the purchase of the goods at the price stated. *Held*, that an order might be made under section 224 of the Code, requiring the defendant to pay the price of the goods. *Per ROOSEVELT, J. Slawson v. Conkey, Ante, 228.*
5. A provisional order directing satisfaction of that part of plaintiff's claim admitted by the answer to be just, is inapplicable :—
  1. Where the answer admits the whole of the plaintiff's claim.
  2. Where the complaint is upon a tort to recover liquidated damages, and the answer admits the indebtedness but denies the tort. *Per MORRIS, J. Slawson v. Conkey, 10 How. Pr. R., 57.*
6. The N. Y. Superior Court will not order the payment of money by the defendant in satisfaction of part of plaintiff's claim, (under section 244 of the Code, subd. 5), unless the answer contains a plain, explicit, and full admission that a definite sum is due to the plaintiff. This provision of the Code is regarded as going no further than the rule which prevailed in the court of chancery, under which it was settled

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that an application to order the payment of money into court, or to a party before final decree, must be founded upon a full and explicit admission by the defendant of the sum due. Such order will not be made therefore, when, to ascertain whether a specific sum is due, a critical examination of the pleadings or of books and accounts is necessary. *Coursen v. Hamlin*, 2 *Duer*, 513.

7. Nor except to enforce payment of moneys held in a fiduciary capacity. *Dusenberry v. Woodward*, *Ante*, 443. But see *Meyers v. Trimble*, *Ante*, 220, 399.
8. Where defendant by answer admits a part of plaintiff's claim to be just, an order requiring him to satisfy such part, will be made in the Common Pleas, notwithstanding that the defendant has made an offer in writing to allow the plaintiff to take judgment for the sum admitted to be due; and such an order will be enforced by attachment, if necessary. *Meyers v. Trimble*, *Ante*, 220, 399; *Quintard v. Secor*, *Ante*, 393.
9. The power of the court to order satisfaction of that part of the plaintiff's claim admitted by the answer to be just, is not confined to cases in which one or more of several distinct items claimed is admitted, but such an order may be made where a part of a sum claimed is admitted to be due. *Quintard v. Secor*, *Ante*, 393.
10. A concession in the answer that not more than a certain sum was due, is a sufficient admission of that sum as a part of plaintiff's claim. *Ib.*

APPEAL, 13; CONTEMPT, 5.

#### SCHOOL OFFICERS.

The practice under the act of 1st May, 1847, entitled "An act in relation to suits against district school officers" (*Laws* 1847, 163); amended 11th April, 1849. (*Laws* 1849, 545)—considered. *People v. Green*, 10 *How. Pr. R.*, 468.

JUSTICES' COURT, *tit. Jurisdiction*, 11; MANDAMUS, 4.

#### SECURITY FOR COSTS.

COSTS, 10, 22, 23, 24, 25; JUSTICES' COURT, *tit. Security*; SUPPLEMENTARY PROCEEDINGS, 7.

#### SERVICE AND PROOF OF.

1. Service of summons upon an elector on election day, is void. *Meeks v. Noxon*, *Ante*, 280.
2. When a statute requires service of a notice on a person, *personal service* is intended, unless some other mode of service is specified or indicated. *Rathbun v. Acker*, 18 *Barb.*, 393.

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3. Where a statute requires personal notice, a notice by mail, although it reaches the party, is non-compliance with the statute. *Id.*
  4. Where the statute requires a notice to be served "personally," or by depositing the same in the post-office, properly folded, and directed to the said persons at their respective places of residence," the validity of the service by mail does not depend upon the locality of residence, but parties residing in the town where the service is made may be served by mail. But *DENIO* and *ALLEN, J. J.*, dissented. *Stanton v. Kline*, 1 *Kern.*, 196.
  5. The expression "at his place of residence," in section 411 of the Code, relates to the post-office and not to any particular locality in a town or city. A package addressed to an attorney at New York, without the addition of his street and number, *Held* sufficient service. *Oothout v. Rhinelander*, 10 *How. Pr. R.*, 460.
  6. Service of summons under the "Act to facilitate the service of process in certain cases," (*Laws of 1853, ch. 511*). *Jones v. Derby*, *Ante*, 458.
  7. Service of process upon a foreign corporation, doing business in this State, may be made upon any person found within the State acting as their agent, unless by a designation filed in the office of the Secretary of State they have appointed some person in the county to receive service. *Laws of 1855, 470, ch. 279*.
  8. A motion for the appointment of a receiver will be denied as irregular, when the order to show cause against the appointment is served before the commencement of the suit. *Kattenstroth v. The Astor Bank*, 2 *Duer*, 632.
  9. The official certificate of a sheriff of another State is not evidence in this State of service of papers; his affidavit should be presented. *Thurston v. King*, *Ante*, 126.
  10. Requisites of an affidavit of service. *Van Wyck v. Reid*, 10 *How. Pr. R.*, 366.
- JUDGMENT, 11, 12; JUSTICES' COURT, *tit. Jurisdiction*, 5; STAY OF PROCEEDINGS, 3, 4, 5.

## SESSIONS.

1. Where one of the members of a court of sessions granting an order of maintenance is one of the individuals who, as superintendents of the poor, apply for the order, the court have no jurisdiction, and the proceedings and order are void. *Converse v. McArthur*, 17 *Barb.*, 410; *Baldwin v. McArthur*, *Id.*, 414.
2. A justice holding special sessions sits as a court, and cannot render

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judgment except when his court is in session, and the record must show this; and, although he may hold his court open after verdict for a time, yet where his session has come to an end he cannot reorganize the court to render judgment. *Lattimore v. The People*, 10 *How. Pr. R.*, 336.

3. Where the order of a county judge, made under *Laws of 1851*, 825, appointed time and place of County Court, but omitted to add the Court of Sessions, an indictment, proceedings and conviction had in the Court of Sessions, were set aside and quashed by the Supreme Court, on certiorari. *People v. Monegan*, 1 *Parker's Cr. R.*, 570.
4. Courts of Sessions as authorized under the judiciary act of 1847, have not power to grant new trials. *It seems* that Courts of Oyer and Terminer have this power. *The People v. The Court of Sessions of Wayne County*, *Ib.*, 369.
5. Where one of the members of a county Court of Sessions is absent, or is by interest or otherwise disqualified from acting in a particular proceeding, it is the duty of the county judge to designate some other justice of the peace of the county to supply the vacancy. *Baldwin v. McArthur*, 17 *Barb.*, 414.
6. The jurisdiction of the Court of General Sessions of the city and county of New York, extended to all crimes and misdemeanors whatsoever. This court may punish for contempt. *Laws of 1855*, 618, *ch.* 337.
7. The jurisdiction of the Court of Special Sessions of the city and county of New York extended to all misdemeanors. The accused may elect to be tried at General Sessions. *Laws of 1855*, 618, *ch.* 337.

CRIMINAL LAW, *tit. Recognizance and Bail*, 5.

#### SHERIFF.

1. The distinction between acts performed *virtute officii* and those done *colore officii*, considered. *Dennison v. Plumb*, 18 *Barb.*, 89.
2. A bond of indemnity given to the sheriff, upon execution, is not invalidated by the fact that it was given after levy and sale. *Westervelt v. Frost*, *Ante*, 74.
3. Where the sheriff was adjudged guilty of contempt, in refusing to return an execution, and was ordered to pay the judgment creditor a fine to the amount of the claim, and the plaintiff in the execution assigned the judgments to the son of the sheriff, for the benefit, as appeared, of the sheriff and his sureties:—*Held*,
  1. That the sheriff could not thereafter enforce the execution. A sheriff cannot do execution when he himself is a party, and whether



he is nominally a party or only beneficially interested, cannot affect the question.

2. That the sale and conveyance of real property by the sheriff under the execution was void. *Carpenter v. Stilwell*, 1 *Kern.*, 61.
4. The defences in an action against a sheriff for an escape. *Ginochio v. Orser*, *Ante*, 433.

ARREST, 1; ATTACHMENT, 4; CHATTEL MORTGAGE, 2; EVIDENCE *tit.* JUDGMENTS and *Judicial proceedings*, 2; INTERPLEADER, 4; JOINER OF ACTIONS, 7; LIMITATION OF ACTIONS, 5; SERVICE OF PROCESS, 9.

### SPECIAL PROCEEDINGS.

1. Proceedings for the appraisal of lands taken for a railroad are Special Proceedings. An order affirming the report of the Commissioners in such proceedings is appealable, where the appeal was taken and undetermined before the passage of the act of 1854, in relation to Special Proceedings; and although previous to the passage of that act there was no authority for such an appeal. Where a report of commissioners of appraisement, upon its face conforms in substance to that requirement of the act, and notice is properly given for its confirmation, it is the duty of the court to confirm it. No affidavit or other proof should be heard on such application to impeach the report. An error of law committed by the commissioners in their decision or in the admission or rejection of evidence can be reviewed only on appeal from their appraisal. *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 *How. Pr. R.*, 168.
2. The Supreme Court has full power in regard to these proceedings, and an appeal from their order confirming a report, will be dismissed. *New York Central R. R. v. Marvin*, 1 *Kern.*, 276.
3. The Referees appointed upon appeal from the determination of the commissioners of highways in refusing to lay out, alter, or discontinue a road, possess all the powers and are required to discharge all the duties formerly possessed by the three judges under the Rev. Stats. *The People v. the Commissioners of Highways*, 4 *Seld.* 476.
4. Of proceedings by the corporation of the City of New York to extend a pier. *Marshall v. Vultee*, 1 *E. D. Smith's C. P. R.*, 294. And see *Thompson v. The Mayor, &c., of New York*, 1 *Kern.*, 115. And *Marshall v. Guion*, *Ib.*, 461.
5. Construction of notice to remove articles obstructing a street, "on or before" a specified day. *Coddington v. White*, 2 *Duer*, 390.
6. The proceedings to compel the determination of claims to real property, referred to by section 308 of the Code, are those specially au-

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thorized by 2 *Rev. Stats.*, 312. And that section does not embrace an action to set aside a conveyance of real estate upon the ground of incompetency of the grantor. *Bridges v. Miller*, *Id.*, 683.

7. The proper mode of proceeding in an action to compel the determination of claims to real property. *Hammond v. Tillotson*, 18 *Barb.*, 332.
8. The statute relative to proceedings to compel the determination of claims to real property, amended. *Laws of 1855*, 943, *ch.* 511.
9. Proceedings to abolish the distinction between town and county poor. *Baldwin v. McArthur*, 17 *Barb.*, 414.

CORPORATION, 14; JUDGMENT, 19; LUNATICS AND HABITUAL DRUNKARDS; SUPREME COURT.

### SPECIFIC PERFORMANCE.

When a specific performance will be decreed. *Slocum v. Closson*, 1 *How. App. Cas.*, 705. *Clarke v. The Rochester, Lockport, & Niagara Falls R. R. Co.*, 18 *Barb.*, 350.

### STATUTORY CONSTRUCTION.

1. Of the principles which should govern in the construction of statutes. *McCluskey v. Cromwell*, 1 *Kern.*, 593.
2. Where a statute prescribes the giving of an instrument, and its purport, it is consideration enough to support the instrument that it was given pursuant to the statute. *Slack v. Heath*, *Ante*, 331.
3. Where the statute requires the execution of a bond to be by "the debtor or his agent, with such *sureties* as shall be approved," &c., an omission to procure more than one surety does not invalidate it. *Ward v. Whitney*, 4 *Seld.*, 442.
4. Powers and duties of receivers in an equity suit commenced before the Code. *Tracy v. Talmadge*, *Ante*, 460.

● ATTACHMENT, 6, 7; CERTIORARI; COSTS, 23, 24, 25; EXECUTION, 5.

### STAY OF PROCEEDINGS.

1. An appeal from an order overruling a demurrer operates as a stay of proceedings; no undertaking being necessary. *Cook v. Pomeroy*, 10 *How. Pr. R.*, 103.
2. What is a judgment directing the payment of money, within the meaning of section 335 of the Code, relating to the stay of execution on appeal. *Curtis v. Leavitt*, *Ante*, 274.
3. The court may grant an *ex parte* order staying proceedings for more than twenty days, although a justice of the court sitting at chambers cannot do so. The papers on which such order is founded need not

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be served with the order. Section 405 of the Code, applies only to orders enlarging the time within which proceedings in the action must be had. *Harris v. Clark*, 10 *How. Pr. R.*, 415.

4. To render an appeal from a judgment at circuit or special term effectual as a stay of proceedings, an undertaking must be executed by the appellant to the effect that he will pay *all the costs* as well as the damages which may be awarded against him on appeal. An omission to provide in the undertaking for the costs of the appeal is fatal, and such an undertaking will not prevent the issuing of execution. The party on whom such an undertaking is served is not bound to return it with a statement of his objections. *Chemung Canal Bank v. Judson*, *Ib.*, 133.
  5. The undertaking to stay proceedings, on appeal, according to section 335 of the Code, must be filed and served with the notice of appeal, or it will not stay proceedings. If it is not served until afterwards, the court will not, on motion, grant a stay of proceedings, unless mistake is shown. *N. Y. Central Insurance Co. v. Safford*. *Ib.*, 344.
- APPEAL, 1, 12; CRIMINAL LAW, *tit. Writ of Error*, 3; COSTS, 20; COURT, 5; MOTIONS AND ORDERS, 6, 7.

## SUMMONS.

A summons which does not state the name of any court is not void; and an order denying a motion to set aside a judgment entered on the service of such a summons, is not appealable. *Tallman v. Hinman*, *Ib.* 89.

AMENDMENT, 4; JUDGMENT, 11, 12; JUSTICES' COURT, *tit. Jurisdiction*, 3; *tit. Summons*; SERVICE AND PROOF OF, 1.

## SUPERIOR COURT.

1. The N. Y. Superior Court has no jurisdiction to appoint a receiver of the property and effects of a foreign corporation, for the purpose of winding up its affairs. *Day v. The United States Car Spring Company*, 2 *Duer*, 608.
2. Whether it has such jurisdiction in the case of a corporation created under the laws of this State, but located and transacting its business in the city of New York,—doubted. *Kattenstroth v. The Astor Bank*. *Ib.*, 632.
3. It will not take jurisdiction to issue a commission of lunacy. *Brown's Case*, *Ante*, 108.

ATTACHMENT, 9; DISCOVERY; JURISDICTION, 9.

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## SUPERVISORS.

The jurisdiction of the board of supervisors, of a claim for costs incurred by the trustees or other officers of a school district. *People v. Green*, 10 *How. Pr. R.*, 468.

EVIDENCE, *tit. Judgments and Judicial Proceedings*, 8; MANDAMUS, 3.

## SUPPLEMENTARY PROCEEDINGS.

1. An order adjudging the defendant in supplementary proceedings guilty of contempt, in not paying over money, as directed by the court, must be entered with the clerk, before an appeal can be taken. *Stewart v. Travis*, *Ib.*, 148.
2. A foreign consul cannot be examined as a judgment debtor, under the provisions of the Code; and if an order for his examination has been obtained and served, he cannot be attached for his refusal to obey it. *Griffin v. Dominguez*, 2 *Duer*, 656.
3. Section 292 of the Code relative to proceedings supplementary to execution, is not applicable in case of a judgment against a corporation. The proper mode of procedure is under the provisions of the Revised Statutes relative to proceedings in equity against corporations. (2 *Rev. Stats.*, 463.) *Hinds v. The Canandaigua & Niagara Falls R. R. Co.*, 10 *How. Pr. R.*, 487.
4. The provisions of the Code relative to supplementary proceedings where the debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, are not applicable to cases where the property is in the open and notorious possession of the debtor, and within reach of execution, and where the debtor shows no design to remove or fraudulently dispose of it. *Sackett v. Newton*, *Ib.*, 560.
5. When it will be presumed that a judgment was for twenty-five dollars, exclusive of costs. *Whitlock's Case*, *Ante*, 320.
6. *It seems*, that there is no case in which it is proper, on supplementary proceedings, to review the merits of the original action. *O'Neil v. Martin*, 1 *E. D. Smith's C. P. R.*, 404.
7. An order dismissing proceedings supplementary to execution, is appealable, but no security is required unless a stay of proceedings is necessary. *Ib.*

## SUPREME COURT.

The limits of the equitable jurisdiction of the Supreme Court over the proceedings of commissioners of estimate and assessment appointed by statute, defined. *Woodruff v. Fisher*, 17 *Barb.*, 224.

COURT, 1, 2; PLEADING, 10.

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## SURROGATE'S COURT.

1. Surrogates possess summary power to settle and adjust the accounts of guardians, and order payment of balance upon final accounting. To "account" means, to render a statement of receipts and disbursements, and pay over the balance due thereon. *Seaman v. Duryea*, 1 *Kern*, 324.
2. Requisites of complaint in an action by a creditor against the heir or devisee of his deceased debtor. *Hollister v. Hollister*, 10 *How. Pr. R.*, 532.

CONTEMPT, 2, 3; ASSIGNMENT, 10.

## TAXES.

1. The power to determine what description of persons shall be taxed, is vested solely in the Legislature. *Wilson v. The Mayor, &c.*, *Ante*, 4.
2. The Legislature of this State might constitutionally have imposed taxes on the personal property within the State, of non-residents; but they have not done so. *Ib.*
3. The several remedies at law for the illegal taxation of a non-resident, enumerated. *Ib.*
4. Assessors acting without their jurisdiction are liable in an action for subjecting one to an illegal and unfounded tax. *People v. Supervisors of Chenango*, 1 *Kern.*, 563.
5. In an action brought by any of several persons interested in real estate which has been sold, or is liable to be sold, for taxes, to compel an apportionment of the tax upon the several interests, the Supreme Court have power, on application, to extend the time of redemption. Like proceedings may be had to redeem, by agreement with the purchaser. Proceedings requisite in case any of those interested are unknown, or are non-residents. Presumptive owners made parties. Sales to be made by referee. *Laws of 1855*, 537, *ch.* 327.

## • TITLE TO LANDS.

APPEAL, 9; COMPLAINT, 17, 18; COSTS, 8; EVIDENCE, *tit. Judgments and Judicial Proceedings*, 4; JUSTICES' COURT, *tit. Jurisdiction*, 8; GUARDIAN AD LITEM, 1; MARRIED WOMEN; PARTITION; REDEMPTION; SHERIFF, 3; SPECIAL PROCEEDINGS, 6, 7; TAXES, 5.

## TRIAL.

[AMENDMENT, 5, 6, 7; ANSWER, 23, 24; APPEAL, 14; COSTS, 3, 5, 8, 11, 14, 15, 16; CRIMINAL LAW, *tit. Trial*; EJECTMENT; EXAMINATION OF ASSIGNOR; EXAMINATION OF PARTIES; EXCEPTIONS; EVIDENCE; JUSTICES' COURT.]

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*I. Place of Trial.*

1. The defendant, after demanding that the place of trial be changed to the proper county, may apply to the court for an order directing the change, at any time before the plaintiff's time for serving an amended complaint has expired. *Conroe v. National Protection Ins. Co.*, 10 *How. Pr. R.*, 403.
2. Where the defendants were a corporation whose place of business was in Saratoga County, and the plaintiffs were non-residents, a motion was granted to change the place of trial to Saratoga County. A corporation must be deemed to have a residence, and its residence is its place of business. *Ib.*

*II. Examination of Witness.*

1. A witness competent to testify of some matters, but not as to others (*e. g.* a defendant competent for his co-defendant as to matters tending to establish a separate defence) is not to be excluded by objection to his competency generally, but improper evidence is to be excluded only by objection to improper questions when asked. *Beal v. Finch*, 1 *Kern.*, 128; compare *Commercial Bank of Pennsylvania v. Union Bank of New York*, *Ib.*, 203.
2. A party placing a witness on the stand, may be required by his adversary to state what he proposes to prove. Per *PARKER, J.*, *Beal v. Finch*, 1 *Kern.*, 128.
3. Where a witness offered is objected to for interest, it is in modern practice entirely discretionary with the court whether the witness shall first be put upon his *voir dire*, or whether the oath in chief shall be administered. The more approved practice now is to swear the witness in chief, and to bring out the facts creating the alleged interest on the examination. *Seeley v. Engell*, 17 *Barb.*, 530.
4. It is within the discretion of the court to permit leading questions to be put to a witness, even upon his direct examination, under particular circumstances. This may be done when an omission in the witness's testimony is evidently caused by a want of recollection which a suggestion may assist. *Cheaney v. Arnold*, 18 *Barb.*, 434.
5. It is not erroneous to reject evidence as irrelevant, merely because a state of the proofs might subsequently arise which would render the evidence pertinent and proper; although when counsel avow an intention to supply testimony in the further progress of the cause, which would give pertinency to the question objected to, the court in the exercise of that discretion which regulates the order of proofs may properly allow an immediate answer. *Cass v. The New York & New Haven R. R. Co.*, 1 *E. D. Smith's C. P. R.*, 522. And see *Gibson v. Pearsall*, *Ib.*, 90. *Downing v. De Klyn*, *Ib.*, 563.

## Reports and Statutes.

## III. Nonsuit.

1. The dismissal of a complaint under the Code in an action for legal relief has no other effect than that of a nonsuit under the old practice. It is no bar to a subsequent suit. *Harrison v. Wood*, 2 *Duer*, 50.
2. The plaintiff's proper course, if surprised by testimony upon the trial, is to submit to a nonsuit or apply for leave to withdraw a juror. He cannot, after having submitted his cause, and on finding that the verdict is against him, become surprised and ask the court to relieve him. *The People v. Marks*, 10 *How. Pr. R.*, 261.
3. Where in an action against several defendants to recover the possession of specific personal property, a taking of the goods by one of the defendants is fully proved, while nothing appears to charge the others, this is not ground for a nonsuit as to all the defendants. But the defendants against whom there is no evidence will be entitled to a nonsuit, while the issue between the plaintiff and the other defendant should be submitted to the jury. *Woodburn v. Chamberlin*, 17 *Barb.*, 446.
4. Although a nonsuit applied for on account of a defect in proof might properly have been granted, yet if either party in the course of trial supplies the proof which was before wanting, the objection is obviated. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 1 *Kern.*, 102. *The Mayor, &c., of N. Y. v. Mason*, *Ante*, 344. *Breidert v. Vincent*, 1 *E. D. Smith's C. P. R.*, 542.
5. Allowance to defendant in case of nonsuit. *Allaire v. Lee*, *Ante*, 125.

## IV. Charge.

1. Where an allegation is wholly unsupported by proof, or where an allegation is supported by *prima facie* evidence, and there is no evidence against it, the judge is not bound to submit it to the jury as an open question, but may instruct them to find it false or true, according to the proof. *The People v. Cook*, 4 *Seld.*, 67.
2. Date of material alteration in an agreement, a question of fact. *Pringle v. Chambers*, *Ante*, 58.
3. It is a question of fact, when an instrument, bearing no date, was made. *Coons v. Chambers*, *Ante*, 165.
4. Whether on a given state of facts a transaction amounts to an account stated is a question of law and not of fact. What are the requisites of an account stated. *Lockwood v. Thorne*, 1 *Kern.*, 170.
5. A request to the court to charge the jury, should be in such form that the court may charge in the terms of the request without qualification. *Carpenter v. Stillwell*, 1 *Kern.*, 61.
6. Where the judge instructed the jury that they must come to a certain

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conclusion if they believed the testimony of the witness to certain facts, and the case showed the witness did not testify to any such facts—*Held*, a misdirection. *Dolsen v. Arnold*, 10 *How. Pr. R.*, 528.

#### V. Verdict.

1. When the jury have improperly severed the damages in an action for a tort against several defendants, the plaintiff may enter judgment against all the defendants for the largest damages given against any one of them. *Beal v. Finch*, 1 *Kern.*, 128. The above rule was doubted in *Bulkeley v. Smith*, 2 *Duer*, 261.
2. The special verdict should not necessarily contain as well the facts admitted in the pleadings as those found by the jury; but the pleadings and the verdict together may properly present the legal questions to the court on appeal. *Barto v. Himrod*, 4 *Seld.*, 483.

#### VI. New Trial.

1. A verdict will not be set aside for misdirection on the part of the judge, if the court can see from the evidence in the cause that the result would have been the same, whether the objectionable directions had been given or not; or where the evidence warrants the verdict. (2 *Cai. R.*, 85; 5 *Wend.*, 257; 10 *Johns.*, 447; 12 *Wend.* 299). *Alston v. Jones*, 17 *Barb.*, 276.
2. A verdict against defendant in an action for enticing away plaintiff's wife, will not be set aside as excessive, unless facts appear which show that the jury were actuated by improper motives. And the court will not infer this, merely from the amount of damages. *Scherpf v. Szadeczky*, *Ante*, 366. But see *Knight v. Wilcox*, 18 *Barb.*, 212.
3. The rule that a verdict will not be disturbed, unless clearly and palpably wrong, is applicable to the decision of a judge upon an issue of fact, tried by him without a jury. *Mann v. Witbeck*, 17 *Barb.*, 388.
4. Where evidence, erroneously admitted, tends directly to establish the plaintiff's case, the court cannot refuse to reverse a judgment for the plaintiff, on the ground that the other proofs in the cause would have warranted the judgment, had the objectionable evidence been excluded. *Hahn v. Van Doren*, 1 *E. D. Smith's C. P. R.*, 411.
5. A party will not be allowed to take an objection for the first time upon a motion for a new trial, which, if it had been made at the circuit, might have been obviated. Therefore, where a cause went to trial, upon a complaint and answer, and the defendant examined witnesses, to prove the facts alleged as a defence in his answer, and the plaintiff had a verdict, and the defendant, upon appeal from an order



at special term, denying his motion for a new trial, for the first time raised the objection that the plaintiff was concluded by the allegations in the answer, in consequence of his failure to reply :—

*Held*—1. That it was now too late to raise the objection.

2. That the defendant should have raised the objection at the trial ; in which case he would have had a verdict upon the pleadings—or the point would have been ruled against him, giving him the right to appeal upon exceptions,—or more properly, leave would have been given to the plaintiff to withdraw a juror, and file a reply upon terms. *Smith v. Floyd*, 18 *Barb.*, 522.

6. Where a record, improperly attested had been admitted upon the trial, and the proper certificates were produced and filed upon the motion for a new trial—*Held*, that a new trial would not be granted. *Markoe v. Aldrich*, *Ante*, 55.

7. After a new trial is ordered, for error, in admitting a deposition taken *de bene esse* upon insufficient proof that the witness was absent from the State, a motion for leave to supply such proof, and thus cure the defect, will not be granted. *Fry v. Bennett*, *Ante*, 289.

8. A new trial, on the ground of newly discovered evidence will not be granted, although the evidence is material, and if produced would have entitled the plaintiff to judgment ; where he might, by ordinary diligence, have availed himself of it upon the trial. *The People v. Marks*, 10 *How. Pr. R.*, 261.

6. Certain newly discovered evidence, held neither cumulative nor impeaching. *Simmons v. Fay*, 1 *E. D. Smith's C. P. R.*, 107.

10. Where it appeared by the testimony of a single witness, whose testimony was not impeached by cross examination or otherwise, that an accord and satisfaction, on which the defendant relied, was obtained by fraud and gross misrepresentation of his affairs. *Held*, that the accord and satisfaction was void, and, the jury having disregarded the testimony, that the verdict should be set aside as against evidence, and a new trial ordered. *Dolsen v. Arnold*, 10 *How. Pr. R.* 528.

11. A new trial will not be granted on the ground of surprise, where surprise arose from the production of an unexpected witness to certain facts, to impeach whom no preparation had been made, and the omission to call an anticipated witness, whose impeachment had been prepared for. *Beach v. Tooker*, *Id.*, 297.

APPEAL, 14, 16 ; COSTS, 13, 14, 15 ; CRIMINAL LAW, *tit. New Trial*, EXCEPTIONS, 7 ; SESSIONS, 4.

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## UNDERTAKING.

1. It is no objection to an undertaking given by the defendant for the return of specific personal property which has been taken from him by requisition on the part of the plaintiff, that the undertaking purports to be given to the plaintiff, and not to the sheriff. *Slack a Heath, Ante*, 331.
2. Error in recitals in an undertaking disregarded. *Hyde a. Patterson, Ante*, 248.
3. As soon as a party has a right of action on an undertaking filed, he may sue upon it without leave of court. It is his property, although he has no right to remove it from the files without leave. *Van Zant a. Cobb*, 10 *How. Pr. R.*, 348.

COSTS, 22, 25; STAY OF PROCEEDINGS, 1.

## UNITED STATES' COURTS.

The District and Circuit Courts of the United States not courts of *inferior* jurisdiction. *Chemung Canal Bank a. Judson*, 4 *Seld.*, 254.

JURISDICTION, 2, 8.

## VARIANCE.

1. Upon the trial of an action upon a contract for the payment of money the defence to which is usury, testimony tending to show usury, but at a different rate from that alleged in the answer, ought not to be excluded for variance. *Deuel a. Spence, Ante*, 237.
2. The provisions of the Code respecting variance between pleadings and proofs are applicable to the defence of usury; and unless the proof of usury differs from the answer in its entire scope and meaning, the variance will be deemed immaterial, if the plaintiff gives no proof that he was misled to his prejudice. *Deuel a. Spence, Ante*, 237; *Catlin a. Gunter*, 1 *Kern.*, 368; *S. C.*, 10 *How. Pr. R.*, 315.
3. *Averment*, that property belonged to plaintiff. *Proof*, it was assigned to plaintiff as a factor, he being chargeable with its value whether sold, lost, or destroyed. *Held*, no material variance. *Gorum a. Carey, Ante*, 285.
4. In a declaration on a contract dated 6th September, 1839, which, by its terms, was to be executed in one year from its date, an averment was made of tender at the expiration of one year from that date, to wit. on the 7th of September, 1840; *Held*, that the count was good, and the *videlicet* being inconsistent, might be rejected as surplusage. *Lester a. Jewett*, 1 *Kern.*, 453.
5. Under an averment of a promise "in or about the year 1845," proof of one in 1848 is no variance. *Beach a. Tooker*, 10 *How. Pr. R.*, 297.

## VERIFICATION.

1. A defect in the verification of a complaint rendering the verification a nullity, merely relieves the defendant from the necessity of answering under oath, but does not affect the validity of a subsequent judgment. *Quin v. Tilton*, 2 *Duer*, 648.
2. The statute requiring a petition to be verified, was held sufficiently complied with, where, instead of the ordinary jurat, there was indorsed upon the petition an affidavit setting forth in detail and affirming the facts set forth in the petition, although it did not in terms refer to the petition. *Van Alstyne v. Erwine*, 1 *Kern.*, 831.
3. Where the verification of a pleading is not made by a party, the agent or attorney making it, so far as he speaks of his own knowledge, must state what knowledge he has; and when he speaks of his belief, he must state the grounds of his belief. In a complaint upon promissory notes, a verification in the ordinary form, but by an attorney, with the additional statement that the notes mentioned in the complaint were in his possession;—*Held*, insufficient. *Treadwell v. Fassett*, 10 *How. Pr. R.*, 184.

AFFIDAVIT; ATTACHMENT, 7; ANSWER, 4, 5.

## WAIVER.

1. In proceedings for the claim and delivery of personal property, a general appearance by defendants, is a waiver of any irregularity in the affidavits on which the requisition is founded. *Hyde v. Patterson*, *Ante*, 248.
2. Failure to raise an objection not always a waiver. *Gates v. Ward*, 17 *Barb.*, 424.

COMPLAINT, 31; JUSTICES' COURTS, *tit. Adjournment*, 1; *tit. Jurisdiction*, 4; *tit. Summons*; *tit. Pleading*, 7, 10; PARTIES, 17.

## WITNESS.

[CONTEMPT, 4; EXAMINATION OF ASSIGNOR; EXAMINATION OF PARTIES; JUSTICES' COURTS, *tit. Adjournment*, 2; TRIAL, *tit. Examination of Witness*, and *tit. New Trial*, 11.]

*I. Competency.*

1. Every witness not appearing to be interested in the issue, is to be deemed disinterested until the contrary is made to appear. *Van Alstyne v. Erwine*, 1 *Kern.*, 331.
2. When an action may be said to be prosecuted or defended for the immediate benefit of a person offered as a witness, so as to render him incompetent. *Crary v. Marshall*, 1 *E. D. Smith's C. P. R.*, 530.

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3. It seems that a person incompetent to testify for a party, cannot be rendered competent by being made a party to the record. So that a plaintiff cannot render competent a witness for whose immediate benefit the action is prosecuted, by joining him as defendant. *Symonds v. Peck*, 10 *How. Pr. R.*, 395.
4. As to the degree of interest which disqualified a witness prior to the Code. *Reynolds v. Mynard*, 1 *How. App. Cas.*, 620.
5. An insolvent debtor who has assigned his property to assignees for the payment of his debts, is a competent witness in an action brought by his assignee in relation to his estate. Such an action is not prosecuted for his immediate benefit within the meaning of the Code. *Symonds v. Peck*, 10 *How. Pr. R.*, 395.
6. When the assignor of a chose in action is a competent witness for the plaintiff, the husband or wife of such assignor is equally competent. *Hastings v. McKinley*, 1 *E. D. Smith's C. P. R.*, 273.
7. Ten days' notice of the examination of the husband or wife unnecessary. *Farley v. Flanagan*, *Ib.*, 313.
8. A next friend is not a competent witness for the party for whom he appears. *Hahn v. Van Doren*, *Ib.*, 411.
9. Where in an action for enticing away the plaintiff's wife, the marriage of the plaintiff with his alleged wife is denied by the defence and the plaintiff has given sufficient evidence to establish it *prima facie*, the defendant cannot examine the wife to disprove the marriage. *Scherpf v. Szadeczy*, *Ante*, 366.
10. Competency of plaintiff as a witness on his own behalf in an action by a guest against an innkeeper, to recover for lost baggage. *Taylor v. Monnot*, *Ante*, 325.
11. An action brought by a receiver of a judgment debtor appointed by the court upon supplementary proceedings against a person indebted to such judgment debtor, is prosecuted for the immediate benefit of the judgment debtor; and the latter is not a competent witness on behalf of the receiver. *Vanduzen v. Worrell*, 18 *Barb.*, 409.
12. A sole *cestui que trust* who as such will be entitled to the whole or a definite portion of the sum for the recovery of which an action is brought, is not a competent witness for the plaintiff in such action. *St. John v. The American Mutual Life Insurance Co.*, 2 *Duer*, 419.
13. A person convicted of perjury remains incompetent as a witness, notwithstanding his subsequent pardon. *Houghtaling v. Kelderhouse*, 1 *Parker's Cr. R.*, 241.
14. Under the Code a defendant cannot be examined by his co-defendant, to establish usury as a defence to their joint promissory note. *Ely v. Miller*, *Ante*, 241.

## Reports and Statutes.

15. Nor to prove in an action for goods sold, that the goods were not purchased, but only received to be disposed of, and to be paid for when sold. *Frost v. Hanford*, 1 *E. D. Smith's C. P. R.*, 540.
16. In an action for tort, the testimony of one defendant, in mitigation of damages, is not admissible in behalf of his co-defendant. *Beal v. Finch*, 1 *Kern.*, 128.

ATTACHMENT, 8; EXAMINATION OF ASSIGNOR; EXAMINATION OF PARTIES; TRIAL, *tit. Examination of Witness*, 1.

*Contradiction and Impeachment.*

1. A witness impeached by proof that before the trial he made statements which conflict with his testimony, cannot be restored to credit by evidence that he has previously made statements in respect to the points upon which he was contradicted which are consistent with his testimony. *Smith v. Stickney*, 17 *Barb.*, 489.
2. A witness cannot be contradicted, by showing that previous to the trial he has expressed an *opinion* inconsistent with the facts stated in his testimony. His prior statements, introduced to contradict him, must be statements of *facts*. *Holmes v. Anderson*, 18 *Barb.*, 420.
3. What foundation must be laid for contradicting a witness by proof of his previous inconsistent statements. *The People v. Austin*, 1 *Parker's Cr. R.*, 154.
4. What evidence against the character of a witness will authorize the party calling him to give evidence of his general good character, in reply. *People v. Gay*, *Id.*, 308.
5. *Held* at Circuit, that inquiries into the motives which influence a witness in testifying, are not collateral but relevant to the main issue; and that a party examining a witness, as to his motives, may contradict his answers. *The People v. Austin*, *Id.*, 154.
6. Whether the credibility of a party, examined as a witness on behalf of the adverse party, can be afterwards impeached. *Holbrook v. Mix*, 1 *E. D. Smith's C. P. R.*, 154.

## WRIT OF ERROR.

Upon a writ of error, brought prior to the Code,—*Held*, that the Court ought not to give judgment of reversal, if there was no error in law, although the defendants in error had not pleaded in *nullo est erratum*. *Hyman v. Cook*, 1 *How. App. Cases*, 419.

CRIMINAL LAW, *tit. Writ of Error*.

THE END.

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